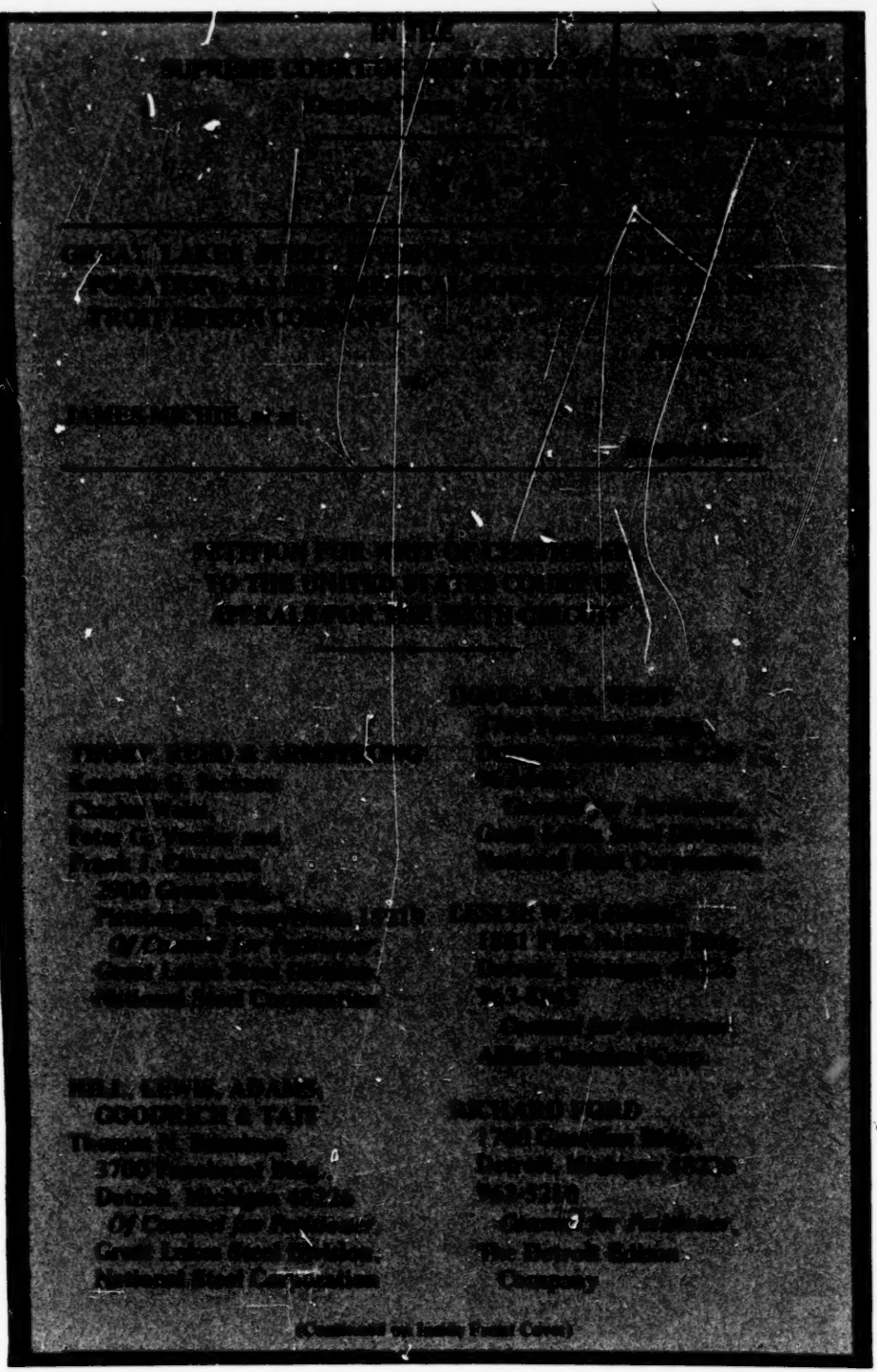

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IN THE SUPREME COURT OF THE UNITED STATES
October Term 1974
No.

GREAT LAKES STEEL DIVISION, NATIONAL STEEL CORPORATION, et al.,

Petitioners,

vs.

JAMES MICHIE, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, GREAT LAKES STEEL DIVISION, NATIONAL STEEL CORPORATION, ALLIED CHEMICAL CORPORATION and THE DETROIT EDISON COMPANY, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in these proceedings on April 4, 1974.

OPINIONS AND ORDERS BELOW

The judgment of the Court of Appeals, from which this appeal is sought, reviewed the following Memorandum Opinion and Order of the United States District Court, Eastern District of Michigan, Southern Division, certified by it under the provisions of 28 U.S.C. §1292(b) as containing controlling issues of law, to-wit:

1. Memorandum Opinion denying Defendants' Motions to Dismiss for Lack of Jursidiction, dated November 10, 1971 (29a).

2. Order denying Defendants' Motion for Reconsideration or Rehearing on Motion to Dismiss for Lack of Jurisdiction, dated January 10, 1973 (37a).

The judgment of the United States Court of Appeals for the Sixth Circuit is reported in *Michie* v. *Great Lakes Steel Division,*

National Steel Corp., 495 F.2d 213 (6th Cir. 1974). Separate Petitions for Rehearing were filed on May 1, 1974 by Defendants, Great Lakes Steel Division, National Steel Corporation, Allied Chemical Corporation and The Detroit Edison Company. The three Petitions were denied by the Court of Appeals by order dated June 7, 1974. (66a).

JURISDICTION

The judgment and opinion of the Court of Appeals for the Sixth Circuit was entered April 4, 1974. Timely Petitions for Rehearing were filed by the Defendants.

The Order of the Court of Appeals denying the Defendants' Petitions for Rehearing was entered on June 7, 1974. This Petition for Writ of Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I

In the absence of clear and established state law, may a Federal District Court sitting in diversity disregard an almost universally accepted rule and assume that the state court would initiate a new and distinctly minority rule imposing joint and several liability for nuisance upon a named few of many independently acting persons contributing to the pollution of the ambient air, which allegedly caused injury to plaintiffs?

The Court below answered: YES

Petitioners submit that the answer is: NO

II

Did the Circuit Court below deny Petitioners their fundamental right of due process by holding that a single defendant could be compelled to pay the entire amount of a judgment for Plaintiffs' injuries, in the circumstances of an infinitude of independent persons contributing to pollution of the ambient air, constituting an alleged nuisance causing Plaintiffs' injuries, where no right of contribution could be established?

The Court below answered: NO

Petitioners submit that the answer is: YES

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

United States Constitution, Amendment V provides:

> AMENDMENT V CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Statutes:

Judicial Code, 28 U.S.C. § 1254(1) provides:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Judicial Code, 28 U.S.C. § 1292(b) provides:

> § 1292. Interlocutory decisions
>
> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Judicial Code, 28 U.S.C. §1332 provides:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: *Provided further*, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico. June 25, 1948.

Michigan Statute – M.C.L.A. §600.2925. Contribution Between Joint Tort-feasors provides:

(1) **Requisites and amount.** Whenever a money judgment has been recovered jointly against 2 or more defendants in an

action for bodily injury or death resulting therefrom, or property damage, and such judgment has been paid in part or in full by 1 or more of such defendants, each defendant who has paid more than his own pro rata share is entitled to contribution with respect to the excess so paid over and above the pro rata share of the defendant or defendants making such payment. Joint tort-feasors who are summoned in as third party defendants pursuant to court rule may likewise be liable for contribution. No person may be compelled to pay to any other defendant an amount greater than his pro rata share of the entire judgment.

(2) **Release of 1 joint tort-feasor not bar to action against others.** It shall be lawful for all persons having a claim or cause of action against 2 or more joint tort-feasors to compound, settle with, and discharge, at any time prior to rendition of a judgment in said action, any and every one or more of said joint tort-feasors for such sum as such person may deem fit, without impairing the right of such person or persons to demand and collect the balance of said claim or cause of action from the remaining joint tort-feasors, against whom such person, or persons, has such claim or cause of action, and not so released.

(3) **Right of insurer of 1 joint tort-feasor to contribution from others.** An insurer of a person jointly or severally liable with 1 or more other persons upon a judgment for the same private wrong, which insurer has on behalf of its insured, discharged the common liability by payment, or has paid more than its insured's pro rata share thereof, shall be entitled to assert either in its own name or in the name of its insured any right to contribution which such insured would have acquired by such payment.

(4) **Claim for contribution, assertion within 6 months.** Any claim for contribution hereunder must be asserted within 6 months after discharge by such party of the common liability or payment of more than his pro rata share. P.A. 1961, No. 236, § 2925, Eff. Jan. 1, 1963.

STATEMENT OF THE CASE

Plaintiffs' Complaint (1a) was filed in the United States District Court in the Eastern District of Michigan, Southern Division,

by 37 individual Canadian citizens against three domestic corporations, alleging diversity jurisdiction under 28 U.S.C. §1332. By appropriate motions (23a, 24a and 25a), the Defendants challenged the existence of the requisite jurisdictional amount in controversy on the ground that such amount was separately required for claims of each Plaintiff against each of the Defendants. These motions were denied by the District Court by Memorandum Opinion dated November 10, 1971, (29a) wherein the Court held that the liability of the Defendants, if established, would be joint and several. Prior to entry of an Order pursuant to such Memorandum Opinion, the Defendants filed a Motion for Reconsideration or Rehearing (33a) on December 8, 1972. The District Court denied such Motion, but certified the jurisdictional question for appeal pursuant to 28 U.S.C. §1292(b) on January 10, 1973 (37a). On January 19, 1973, the Defendants filed Petitions for Permission to Appeal pursuant to said certification, which Petitions were granted on March 2, 1973. The Court of Appeals issued its judgment and opinion (40a) on April 4, 1974, holding that in the event the jury held in favor of Plaintiffs but was unable to apportion the harm among the multiple contributors to the pollution, the entire liability could be imposed upon one (or several) of the Defendants, subject to a subsequent right of contribution against all persons who contributed to the pollution. Although the Court's opinion assumed a right of contribution, such question was not presented in the briefs. The Defendants filed Petitions for Rehearing (49a, 55a and 64a) on May 1, 1974 asserting that the court had not only failed to follow the mandate of *Erie R.R. Co.* v *Tompkins*, 304 U.S. 64 (1938) but had also deprived Defendants of fundamental due process on the erroneous assumption that Defendants could establish a right of contribution. Said Petitions were denied by Order entered by the Court of Appeals on June 7, 1974.

REASONS FOR GRANTING THE WRIT

The Complaint alleges that the 37 individual Plaintiffs, citizens of Ontario, Canada, suffered personal injuries and property damages as a result of an alleged continuing nuisance created by pollution of the ambient air carried across the Detroit River into Canada and into the vicinities of Plaintiffs' residences. The Complaint further alleges that emissions resulting from the operation

of Defendants' industrial facilities have contributed to such pollution. Although each of the Plaintiffs alleged damages in excess of $10,000.00, no one of the Plaintiffs alleged which Defendant was responsible for any particular damages suffered by any Plaintiff. There is therefore no claim by any Plaintiff against each Defendant, in the jurisdictional amount of $10,000.00.

The Detroit metropolitan area is a highly industrialized community - particularly in the "down river" area where the Defendants' facilities are located. The commercial and industrial establishments in the area which emit contaminants into the ambient air number in the hundreds and motor vehicles and other sources number in the millions.[1] The actual number of sources of air contaminants in the area is indeterminable.

It was the holding of the courts below that if the three named Defendants are found to have *contributed* to a nuisance of pollution of the ambient air causing injuries to the Plaintiffs, which injuries are not separately and distinctly shown to have been caused by any one particular Defendant, *each and every* Defendant will be separately liable for *all* of the Plaintiffs' injuries, notwithstanding the fact that none of the emitters of contaminants (Defendants and others) acted in concert and notwithstanding the fact that the emissions from any one source might not, by itself, have been injurious to Plaintiffs.

This holding appears on the surface to treat only the simple and narrow issue of sufficiency of jurisdictional allegations based upon a construction of substantive state law. The effect of the Court's holding, however, is of vastly greater and far reaching significance in that it (1) reverses established precedent in the application of the *Erie* doctrine in the United States Court of Appeals for the Sixth Circuit and conflicts with decisions of other United States Courts of Appeals; (2) sanctions the denial of fundamental due process of law to Petitioners and all prospective co-defendants

[1] In their Brief filed in the Court of Appeals, Plaintiffs made reference to the Joint Air Pollution Study of St. Clair-Detroit River Areas, prepared by the International Joint Commission, Canada and the United States, which identified in excess of 100 major emitters of contaminants carried across the international boundary of the Detroit River. The emissions of 130 sources comprised only approximately 8% of the hydrocarbon and 68% of the particulate of the total air contaminants.

that may be added in the instant case; and (3) involves issues of great national and international importance not only to Petitioners but to all current and potential Defendants in pollution litigation.

I

THE DECISION BELOW REVERSES PREVIOUS DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH DECISIONS OF OTHER UNITED STATES COURTS OF APPEAL.

The principal question presented to the Court of Appeals, as stated by the Court, was as follows:

> "Under the law of the State of Michigan, may multiple defendants, whose *independent actions* of allegedly discharging pollutants into the ambient air thereby allegedly create a *nuisance*, be jointly and severally liable. . . ."[2] (Emphasis Added)

A detailed discourse into the subject of the substantive Michigan law on this issue is neither pertinent nor necessary. Suffice it to say that Michigan law on this question has not been established.[3] It is unquestionable, however, that the majority or universally

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[2] *Michie* v. *Great Lakes Steel Division, National Steel Corp.*, 495 F.2d 213, 215 (6th Cir. 1974).

[3] Indeed, the fact that the Michigan Supreme Court has never ruled on the precise issue, was acknowledged by the Court of Appeals at page 218, where it stated, "In this diversity case Michigan law is not finally and conclusively declared". There is, however, indication that Michigan follows the universal rule denying joint and several liability in cases involving multiple independent tortfeasors. See *Meier* v. *Holt*, 347 Mich. 430, 80 N.W. 2d 207 (1957); *DeWitt* v. *Gerard*, 281 Mich. 676, 275 N.W. 729 (1937); *Frye* v. *City of Detroit*, 256 Mich. 466, 239 N.W. 886 (1932); *Robinson* v. *Baugh*, 31 Mich. 290 (1875). In addition, the Michigan Supreme Court has followed the lead of the *Restatement of Torts*, §§879, 881 (1939) and comments thereto. In fact, the Court of Appeals relied heavily on *Maddux* v. *Donaldson*, 362 Mich. 425, 108 N.W. 2d 33 (1961), an auto negligence case in which joint and several liability was imposed on two defendants, wherein the Michigan Supreme Court expressly acknowledged the distinction between negligence cases and nuisance cases and in support of such distinction cited the *Restatement* and the sections thereof cited above.

accepted rule on such issue holds that there would be no such joint and several liability for nuisance.[4] The Court of Appeals ignored these authorities, however, and ruled that the defendants would be jointly and severally liable because of the "injustice" of requiring Plaintiffs to prove that a certain Defendant's emissions caused particular damages to Plaintiffs. The Court of Appeals therefore followed a distinctly minority rule and resolved the *Erie*[5] issues by stating:

> "Like the District Judge, we see a *close analogy* between this situation and the *Maddux* case. We believe the Michigan Supreme Court would do so likewise."[6] (Emphasis added)

It is respectfully submitted, however, that where direct authority exists, it must be followed;[7] but where as here, the authority relied upon by the Court of Appeals is indirect and does not rise to the level of a clear state court pronouncement, *Erie* does not permit the use of a "*close analogy*" to support the extension of an "emerging" and purportedly "better" legal philosophy in the face of an existing and almost universally accepted rule on such issue.

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[4] The almost universal rule is set forth in Cooley, *Torts* §88 at 783-4 (4th Ed. 1932) and Prosser, *Law of Torts* at 628-9 (3d Ed. 1964). As was the situation with the *Restatement*, both of these treatises were cited by the court in *Maddux* but not accepted by the Court of Appeals.

The case of *Landers* v. *East Texas Salt Water Disposal Co.*, 151 Tex. 251, 248 S.W. 2d 731 (1952) was cited by the Court of Appeals to support its holding. Although *Landers* is distinguishable from the instant case, while adopting a minority rule, it also clearly stated the majority rule on the issue in the case before it:

"But with the exception of Oklahoma and Kansas [citations omitted], the courts of the country seem to be virtually unanimous in refusing to impose joint and several liability on multiple wrongdoers whose independent tortious acts interfere with a landowner's interest in the use and enjoyment of land by interfering with his air or water. *Restatement of the Law of Torts*, Vol. 4, p. 449 Sec. 881; Cooley on Torts, 4th Edition, Vol. 1, pp. 283-287; 9 A.L.R. 947-952; 35 A.L.R. 412; 91 A.L.R. 763-765." 151 Tex. at 255, 248 S.W. 2d at 733.

[5] *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938).

[6] *Michie*, *supra*., at 218.

[7] See discussion of *Maddux*, and the *Restatement of Torts*, §§ 878, 881, *supra*, n. 3.

Under the *Erie* doctrine, a Federal Court sitting in a diversity case must follow substantive state law. In *Werthan Bag Co.* v. *Agnew*, 202 F.2d 119 (6th Cir. 1953), the Court of Appeals established for the Sixth Circuit the approach to be taken when faced with an absence of a clear pronouncement by the highest state court on a particular rule of substantive law. This approach, also adopted in the majority of circuits, is the recognition of the universal or majority rule and the application thereof, notwithstanding a claim that an emerging minority rule may be "better" or "more equitable." In establishing such approach the Sixth Circuit in *Werthan Bag* stated as follows:

> In *West* v. *American Telephone & Telegraph Co.*, 311 U.S. 223, 61 S.Ct. 179, 85 L.Ed. 139, the [*Erie*] doctrine was extended further to require the federal courts in such cases, where the highest court of the state has not pronounced on the subject, to ascertain from all the available data what the state law is and to apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from prior decisions of the federal courts.
>
> We think these two opinions of the Supreme Court, [*Erie* and *West*] considered together, reveal how strongly the Supreme Court intended to restrict the federal courts in the pronouncement of their own views of the common law when inconsistent with the opinions of the state courts. It would seem that, in the teeth of such intended curtailment, this court would not be privileged to declare the law of Arkansas to be contrary to the *universal law applied in the other states whose courts have spoken upon the subject.*"[8] (Emphasis added)

Petitioners submit that by its decision in the instant case, the Court of Appeals has now reversed *Werthan Bag*, and intends *to predict* what the substantive law of a state *will be*. This departure from the application of the universal or majority rule, in addition to being in conflict with its own decision, is squarely opposed to the approach followed in at least four other circuits.

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[8] 202 F.2d at 124-125.

For example, in citing *Werthan Bag* with approval, the Tenth Circuit in *Criqui* v. *Blaw - Knox Corp.* 318 F.2d 811 (10th Cir. 1963), has stated:

> "Where there is a conflict in the decisions of the state courts of our country, the federal court construing the law of the state in question, will assume that the courts of that state will follow the weight of authority."
>
> "And, we are constrained to say that we agree with some of the cirticisms of the majority rule as pointed out in these articles and by the appellant. However, there can be no doubt but what the denial of such an action remains the majority rule."
>
> "We, of course, recognize that the modern trend does appear to favor the appellant's position and that the Supreme Court of Kansas, in the absence of statutory prohibitions, may some day lay down such a rule. Nevertheless, that decision should come in the first instance from the Kansas Court and not from this court."[9]

The Third Circuit is also in agreement with this approach as indicated by its holding in *Small* v. *United States*, 333 F.2d 702 (3rd Cir. 1964), wherein the court stated at page 704:

> "We have found no [Delaware] case in point, and those cited by the plaintiff are inapposite. We therefore assume that the courts of Delaware would follow the majority rule upon which the first part of our decision rests."

The philosophy supporting the view that the federal courts should not be free to speculate as to how the state courts might rule, and therefore should apply the majority rule on the issue, was further expressed by the Fifth Circuit in *Polk County, Georgia* v. *Lincoln National Life Ins. Co.*, 262 F.2d 486 (5th Cir. (1959),

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[9] 318 F.2d at 812, 813, 814. *See also United States* v. *Jones*, 229 F.2d 84 (10th Cir. 1955) *cert. denied*, 351 U.S. 939 (1956) and *Mills* v. *Hoffah*, 465 F.2d 29 (10th Cir. 1972).

wherein the court took the opportunity to specifically disagree with the Second Circuit, which at that time had taken the contrary view:[10]

> "In the Second Circuit, in an opinion where Judge Frank spoke for the court, it was said:
>
> 'Perhaps the guessing-guide is this: What would be the decision of reasonable intelligent lawyers, sitting as judges of the highest New York Court, and fully conversant with New York 'jurisprudence'? An alternative test is what we conjecture would be the decision of the particular judges who now constitute that court. Probably the presumption is that the result of the two tests would be identical; but happily we are relieved from the need of considering that question, because, knowing the sitting judges, we feel certain that such a presumption accords with the facts.' *Cooper* v. *American Airlines*, 2 Cir., 1945, 149 F.2d 355, 162 A.L.R. 318. *Cf.* Frank, *Law and the Modern Mind*, 148 et seq.
>
> If the views so expressed are to prevail it would seem that the Federal Courts, in their search for a rule of state law, would be attempting to psychoanalyze state court judges rather than to rationalize state court decisions."[11]

Thus, at least four circuits have clearly enunciated the approach suggested by Petitioners.

In addition to the intra-circuit conflicts existing in the Second[12] and Sixth Circuits, the Ninth Circuit has recently changed its position on this issue. In *Summers* v. *Wallace Hospital*,

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[10] The Second Circuit has since abandoned its view that the federal courts may speculate as to how the state courts may rule and is currently taking a position consistent with that of Petitioners. *See Lee* v. *Jenkins Brothers*, 268 F.2d 357 (2nd Cir. 1959) wherein it is stated at page 364:

> "The Connecticut cases have not yet quite come to grips with the question. Hence, it is necessary to consult the 'general' law on the subject, on the assumption that, if a general rule can be found, Connecticut would follow it."

[11] 262 F.2d at 489.

[12] Footnote 10, *supra*.

276 F.2d 831 (9th Cir. 1960), the Ninth Circuit determined that the Idaho Supreme Court had not ruled on the precise question of state law involved and then applied the majority rule followed by other state courts. However, in *Klingebiel* v. *Lockheed Aircraft Corp.*, 494 F.2d 345 (9th Cir. 1974), the Ninth Circuit appearing at first blush to apply the majority rule actually suggested the opposite approach as follows:

> "[T]he duty of the federal court is to ascertain and apply the existing California law, not to predict that California may change its law and then to apply the federal court's notion of what the change might or ought to be...
>
> *Only when the question has not been decided in California do we have the doubtful privilege of 'first guessing' what the California courts might do.*" [13] (Emphasis added)

This approach of "first guessing" is obviously in irreconcilable conflict with the approach of the Second, Third, Fifth and Tenth Circuits.

From the foregoing, it is apparent that there is a lack of unanimity among the Circuits as to how *Erie* is to be applied in cases where there is no state court pronouncement on the precise issue involved. There being no definitive direction from this Court on such question, an inter-circuit conflict exists, and several Circuits, including the Court of Appeals below, are changing their respective positions on the question, increasing the magnitude of the conflict and confusion. It is therefore respectfully submitted that this conflict and confusion on so important an issue as the proper application of the *Erie* doctrine can and should be effectively resolved only by prompt review by this Court.

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[13] 494 F.2d at 346-347.

II

COMPELLING A SINGLE DEFENDANT TO PAY FOR THE ENTIRE AMOUNT OF PLAINTIFFS' INJURIES WHERE THERE IS AN INFINITUDE OF PERSONS CONTRIBUTING TO THE NUISANCE CAUSING SUCH INJURY, BY THEIR SEPARATE AND INDEPENDENT ACTS, DENIES TO SUCH DEFENDANT FUNDAMENTAL DUE PROCESS OF LAW, WHERE NO RIGHT OF CONTRIBUTION CAN BE ESTABLISHED.

The Court of Appeals expressed what appears to be the underlying rationale of its decision to impose joint and several liability on the Defendants, as follows:

> "Where the injury itself is indivisible, the judge or jury must determine whether or not it is practicable to apportion the harm among the tortfeasors. If not, the entire liability may be imposed upon one (or several) tortfeasors *subject, of course, to subsequent right of contribution among the joint offenders.*"[14] (Emphasis added)

It is apparent that the Court of Appeals relied upon the mitigating effect of a right of contribution to avoid a denial of fundamental due process of law guaranteed by the Fifth Amendment to the United States Constitution, which would otherwise be the result of a holding that one person may be held responsible for the independent acts of others over which he has absolutely no control. Petitioners submit, however, that under applicable Michigan law, a Defendant compelled to pay a judgment in this case could not establish a right of contribution.

There exist in Michigan two sources of authority under which one may seek a right of contribution — statutory and equitable. The Michigan statute dealing with the right of contribution[15] is applicable only to "joint-tortfeasors." Under the reasoning of the Circuit Court below, however, Petitioners are not "joint-tortfeasors," but rather are independent tortfeasors who may be held jointly and severally liable. Therefore, under Michigan law, and contrary to the assumption of the Court below, Petitioners have

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[14] 495 F.2d at 217.

[15] M.C.L.A. §600.2925, "Contribution Among Joint-Tortfeasors." This statute was referred to in footnote 3 of the Court's opinion.

no *statutory* right of contribution from other independent emitters of air contaminants.[16] Petitioners must therefore rely solely upon the judicial doctrine of "equitable contribution" to avoid the unjust imposition upon them of liability for Plaintiffs' injuries not caused by them.

In the recent decision of *Moyses* v. *Spartan Asphalt Paving Co., Id.*, the Michigan Supreme Court declared that there exists in Michigan an equitable (non-statutory) right of contribution, applicable to non-joint wrongdoers.

> "[We] have decided to overrule what is left of Michigan's Common-law bar of contribution between . . . 'wrongdoers,' . . . Such overrulement will leave the issue of contribution to equitable principles as known hitherto and now in matters of express or implied contract."[17]

If Petitioners are able to satisfy these "equitable principles" of contribution, they might not be solely responsible for bearing the entire cost of Plaintiffs' alleged injuries, resulting from ambient air pollution contributed to by thousands of other sources. As set forth below, however, the nature of the wrong complained of effectively precludes Petitioners from obtaining such equitable contribution.

In a case involving tortious conduct, a Defendant seeking equitable contribution must be able to apportion the cost of the harm done amongst himself and those from whom he seeks contribution, in order to sustain the burden of proof imposed by the equitable rule of contribution. If a Defendant cannot prove that he has been compelled to pay more than his "share" of the damages, he will be unable to obtain contribution since he will be unable to demonstrate that his payment of the full damages is inequitable.[18] But a Defendant who has had the entire liability

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[16] This result is clearly indicated by the Michigan Supreme Court's opinion in *Moyses* v. *Spartan Asphalt Paving Co.*, 383 Mich. 314, 331, 174 N.W. 2d 797, 804 (1970).

[17] 383 Mich. at 334-335, 174 N.W. 2d at 806.

[18] *Lorimer* v. *Julius Knack Coal Co.*, 246 Mich. 214, 224 N.W. 361 (1929).

for Plaintiffs' injuries imposed upon him under the opinion of the Court below, will, by definition, already have demonstrated his inability to sustain such burden. The Court of Appeals below stated:

> "Where the injury itself is indivisible, *the judge or jury must determine whether or not it is practicable to apportion the harm among the tortfeasors.* If not, the entire liability may be imposed upon one (or several) tortfeasors subject, of course, to subsequent right of contribution among the joint offenders."[19] (Emphasis added)

Thus, the Court has, in the same breath, said that there will be joint and several liability and that one independent tortfeasor can be compelled to pay the entire judgment if the harm cannot be apportioned amongst the multiple tortfeasors, but that they will have a right of contribution. This right, however, requires the same apportionment of the harm, as a predicate for such contribution, as was in issue with respect to the question of joint and several liability in the first instance. Because the issue of apportionment of the harm would, of necessity, have already been determined against Petitioners, the "right" really does not exist at all.

Petitioners further submit that because of the circumstances of this case,[20] including an infinitude of polluters, any effective right of *total* contribution is illusory. Petitioners will be required to show that the damages paid by them are disproportionate to the harm inflicted. They will therefore be required to ascertain the identity of and the ratio of pollutants for which each such third person is or was individually responsible over the period in question. Because of the thousands or millions of third parties included, such a task is manifestly impossible. The effect of the ruling of the Court below is that one, or two, or three named Defendants will be liable to anyone injured by the nuisance of air pol-

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[19] 495 F.2d at 217.

[20] The factual setting in this case is obviously distinguishable from *Maddux, supra.*, and *Landers* v. *East Texas Salt Water Disposal Co., supra.*, cited by the court below. In each of those cases, the "wrongdoers" who were held jointly and severally liable were only two in number in each case, and were also parties to the action. There was in those cases no question of unknown or indeterminable third parties who were in any way responsible for Plaintiff's injuries, for which the party Defendants were to be held liable.

lution for the *entire* amount of such injury, no matter how small the contribution of such Defendant to the whole. Even if the question of apportionment of the harm has not already been legally foreclosed, he will then have to attempt to join all of the many thousands of persons contributing to the injury in a suit for contribution. Such a suit, however, would be clearly unmanageable and would indeed be an exercise in futility.

The result of the decision below is therefore clear. Petitioners may be held individually liable for the independent acts and conduct of others over whom they have no control, even though the separate actions of each Defendant may not itself have been actionable. At the same time, Petitioners are effectively denied both the right, as a legal matter, and a remedy, as a practical matter, of contribution from others who clearly contributed to the nuisance and injury complained of. Property may not be taken from one to satisfy the wrong done by another without at least permitting a recourse for restitution. To take a man's property with one hand and give him a non-existent remedy with the other is not in accord with the sense of justice which pervades the Constitution and which is so clearly stated in the Fifth Amendment. It is respectfully submitted that such a result directly contravenes the fundamental principle that Petitioners' property shall not be taken without due process of law.

CONCLUSION

For the reasons above stated it is respectfully submitted that this Court should issue its Writ of Certiorari to review the judgment and opinion of the Court below.

Respectfully submitted:

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Dated: August 27, 1974

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COMPLAINT

(Filed June 19, 1970)

Plaintiffs by their Attorneys, Ripple and Chambers, P.C. complain of defendants and declare:

Count I

1. That plaintiffs are citizens of the Province of Ontario; that defendants are citizens of or established in the State of Michigan; and that the matter in controversy exclusive of interest and costs exceed Ten Thousand ($10,000.00) Dollars.

2. That the defendants are occupiers or in possession of certain premises situated in Wayne County, Michigan, adjacent to or in proximity to the Detroit River, in the Cities of Detroit, River Rouge and Ecorse, whereupon they operate certain manufacting plants or power plants.

3. That the plaintiffs are residents of the Township of Sandwich West, Essex County, Ontario and occupiers of various premises in proximity to the Detroit River and across the same from defendants' aforesaid premises.

4. That there is a common question of law or fact affecting the rights of these plaintiffs and a common relief is sought, and that this action is brought as a class action under the provisions of Federal Rule 23(a)(3).

5. That the defendants now operate and have been operating since prior to 1935 activities on their premises from which they have regularly and continuously discharged or permitted to be discharged into the air soot, smoke, gases, fumes, fly ash, dust, industrial dust, and related substances.

6. That at all times mentioned herein the aforesaid substances were carried by air currents and gases onto the premises of plaintiffs.

7. That the discharges of these substances were of such volume and regularity and of such a noxious character that the same constituted a nuisance.

8. That the aforesaid discharges were in violation of the Ordinances of the City of Detroit, River Rouge and Ecorse and of the regulations of the State of Michigan Administrative Code and of the regulations of the Wayne County Health Department.

9. That as a direct and proximate result thereof the plaintiffs, James Michie and Victoria Michie, who are husband and wife respectively, have sustained to their damage:

(a) Damages to their property and the expenses of maintenance, repairs, corrections and prevention of same.

(b) Loss of the normal use and enjoyment of their premises.

(c) Annoyance, inconvenience and discomfort.

(d) Diminution in the value of their premises.

(e) That the plaintiff, Victoria Michie, has sustained injuries and disease and impairment of health with respect to her nose, throat, lungs, eyes, respiratory passages and allergenic reactions with resulting pain and suffering.

(f) That the plaintiff, James Michie, has sustained to his damage medical expenses incurred on behalf of his wife, Victoria Michie, on account of her injuries as aforesaid.

(g) That the plaintiff, James Michie, has sustained loss of the consortium of his wife, Victoria, on account of her injuries as aforesaid.

10. That as a direct and proximate result thereof the plaintiffs, Anthony Hudvagner and Lois Hudvagner, who are husband and wife and are parents of the plaintiffs, Kevin and Michael Hudvagner, have sustained to their damage the following:

(a) Damage to their property and the expenses of maintenance, repairs, corrections and prevention of same.

(b) Loss of the normal use and enjoyment of their premises.

(c) Annoyance, inconvenience and discomfort.

(d) Diminution in the value of their premises.

(e) That the plaintiffs, Anthony Hudvagner, Lois Hudvagner, Kevin Hudvagner and Michael Hudvagner, have sustained personal injuries or disease and impairment of health with respect to their nose, throat, lungs, eyes, respiratory passages, and allergenic reactions, with resulting pain and suffering.

(f) That the plaintiff, Anthony Hudvagner, has sustained to his damage the medical and hospital expenses incurred on behalf of his wife, Lois, and his children, Kevin and Michael Hudvagner, on account of their injuries as aforesaid.

(g) That the plaintiff, Anthony Hudvagner has sustained the loss of the consortium of his wife, Lois Hudvagner, on account of her injuries as aforesaid.

11. That as a direct and proximate result thereof the plaintiffs, Edwin Miller and Sarah Miller, who are husband and wife and are parents of the plaintiffs, Carolyn Miller and Susan Miller, have sustained to their damage:

(a) Damages to their property and the expenses of maintenance, repairs, corrections and prevention of same.

(b) Loss of the normal use and enjoyment of their premises.

(c) Annoyance, inconvenience and discomfort.

(d) Diminution in the value of their premises.

(e) That the plaintiffs, Carolyn Miller and Susan Miller have sustained personal injury or disease and impairment of health with respect to their nose, throat, lungs, eyes, respiratory passages, and allergenic reactions, with resulting pain and suffering.

12. That as a direct and proximate result thereof the plaintiffs, Carl Moore and Juliann Moore, who are husband and wife respectively and are parents of the plaintiffs Carl Moore, Jr., Marilyn Moore, and Melody Moore, sustained to their damage:

(a) Damage to their property and the expenses of maintenance, repairs, corrections and prevention of same.

(b) Loss of the normal use and enjoyment of their premises.

(c) Annoyance, inconvenience and discomfort.

(d) Diminution in the value of their premises.

(c) That the plaintiffs, Juliann Moore, Carl Moore, Jr., Marilyn Moore and Melody Moore, have sustained personal injuries or disease and impairment of health with respect to their nose, throat, lungs, eyes, respiratory passages, and allergenic reaction with resulting pain and suffering.

(f) That the plaintiff, Carl Moore, sustained to his damage medical, hospital and related expenses incurred on behalf of his wife and children on account of their injuries as aforesaid.

(g) That the plaintiff, Carl Moore, sustained the loss of the consortium of his wife, Juliann Moore, on account of her injuries as aforesaid.

13. That as a direct and proximate result thereof the plaintiff, Bernice Shepherd, has sustained to her damage the following:

(a) Damage to her property and the expenses of maintenance, repairs, corrections and prevention of same.

(b) Loss of the normal use and enjoyment of their premises.

(c) Annoyance, inconvenience and discomfort.

(d) Diminution in the value of her premises.

(e) That the plaintiffs, Bernice Shepherd and Sharon Shepherd, who are mother and daughter, have sustained personal injury or disease and impairment of health with respect to their nose, throat, lungs, eyes, respiratory passages and allergenic reactions with resulting pain and suffering.

(f) That the plaintiff, Bernice Shepherd has sustained to her damage the hospital, medical and related expenses incurred on behalf of her daughter, Sharon Shepherd, on account of her injuries as aforesaid.

14. That as a direct and proximate result thereof the plaintiffs, Joseph Ubene and Jeannine Ubene, who are husband and wife and parents of Philip Ubene, Rose-Ann Ubene and Roxanne Ubene, have sustained to their damage the following:

(a) Damage to their property and the expenses of maintenance, repairs, corrections and prevention of same.

(b) Loss of the normal use and enjoyment of their premises.

(c) Annoyance, inconvenience and discomfort.

(d) Diminution in the value of their premises.

(e) That the plaintiffs, Philip Ubene, Rose-Ann Ubene, and Roxanne Ubene, have sustained personal injuries or disease and impairment of health with respect to their nose, throat, lungs, eyes, respiratory passages and allergenic reactions, with resulting pain and suffering.

15. That as a direct and proximate result thereof the plaintiffs, Ernest Vegh and Kaye Vegh, who are husband and wife respectively have sustained to their damage:

(a) Damage to their property and the expenses of maintenance, repairs, corrections and prevention of same.

(b) Loss of the normal use and enjoyment of their premises.

(c) Annoyance, inconvenience and discomfort.

(d) Diminution in the value of their premises.

16. That as a direct and proximate result thereof the plaintiffs, Ernest Warnholz and Hazel Warnholz, who are husband and wife respectively, have sustained to their damage the following:

(a) Damage to their property and the expenses of maintenance, repairs, corrections and preventions of same.

(b) Loss of the normal use and enjoyment of their premises.

(c) Annoyance, inconvenience and discomfort.

(d) Diminution in the value of their premises.

(e) That the plaintiff, Hazel Warnholz, sustained personal injuries or disease and impairment of health with respect to their nose, throat, lungs, eyes, respiratory passages, and allergenic reaction with resulting pain and suffering.

(f) That the plaintiff, Ernest Warnholz, has sustained to his damage the medical and hospital expenses incurred on behalf of his wife, Hazel, on account of her injuries as aforesaid.

(g) That the plaintiff, Ernest Warnholz, has sustained the loss of the consortium of his wife, Hazel Warnholz, on account of her injuries as aforesaid.

17. That as a direct and proximate result thereof the plaintiffs, Herbert Luppke and Rose Luppke, who are husband and wife have sustained to their damage the following:

(a) Damage to their property and the expenses of maintenance, repairs, corrections and prevention of same.

(b) Loss of the normal use and enjoyment of their premises.

(c) Annoyance, inconvenience and discomfort.

(d) Diminution in the value of their premises.

18. That as a direct and proximate result thereof the plaintiffs, Adam Gungle and Helen Gungle, who are husband and wife and are parents of the plaintiff, Gayle Gungle, have sustained to their damage the following:

(a) Damage to their property and the expense of maintenance, repairs, corrections and prevention of same.

(b) Loss of the normal use and enjoyment of their premises.

(c) Annoyance, inconvenience and discomfort.

(d) Diminution in the value of their premises.

(e) That the plaintiff, Gayle Gungle, has sustained to her damage personal injuries or disease and impairment of health with respect to her nose, throat, lungs, eyes, respiratory passages, and allergenic reactions, with resulting pain and suffering.

(f) That the plaintiff, Adam Gungle, has sustained to his damage the medical and hospital expenses incurred on behalf of his daughter, Gayle Gungle, on account of her injuries as aforesaid.

19. That as a direct and proximate result thereof the plaintiffs, Robert Olsen and Margaret Olsen, who are hus-

band and wife and parents of Bradley Olsen, have sustained to their damage the following:

(a) Damage to their property and the expenses of maintenance, repairs, corrections and prevention of same.

(b) Loss of the normal use and enjoyment of their premises.

(c) Annoyance, inconvenience and discomfort.

(d) Diminution in the value of their premises.

(e) That the plaintiffs, Margaret Olsen and Bradley Olsen, have sustained personal injuries or disease and impairment of health with respect to their nose, throat, lungs, eyes, respiratory passages, and allergenic reactions, with resulting pain and suffering.

(f) That the plaintiff, Robert Olsen, has sustained to his damage the medical and hospital expenses incurred on behalf of his wife, Margaret Olsen and his son, Bradley Olsen, on account of her injuries as aforesaid.

(g) That the plaintiff, Robert Olsen, has sustained the loss of the consortium of his wife, Margaret Olsen, on account of her injuries as aforesaid.

20. That as a direct and proximate result thereof the plaintiffs, Bernard Mailloux and Gloria Mailloux, who are husband and wife respectively have sustained to their damage the following:

(a) Damage to their property and the expenses of maintenance, repairs, corrections and prevention of same.

(b) Loss of the normal use and enjoyment of their premises.

(c) Annoyance, inconvenience and discomfort.

(d) Diminution in the value of their premises.

21. That as a direct and proximate result thereof the plaintiffs, Martin Dupuis and Donna Dupuis, who are husband and wife respectively, have sustained to their damage the following:

(a) Damage to their property and the expenses of maintenance, repairs, corrections and prevention of same.

(b) Loss of the normal use and enjoyment of their premises.

(c) Annoyance, inconvenience and discomfort.

(d) Diminution in the value of their premises.

Wherefore, plaintiffs pray this court grant them compensatory damages against the defendants in the sums of:

For James Michie and Victoria Michie, jointly, Thirty-Five Thousand ($35,000.00) Dollars; for Victoria Michie, Eleven Thousand ($11,000.00) Dollars and for James Michie, Eleven Thousand ($11,000.00) Dollars.

For Anthony Hudvagner and Lois Hudvagner, jointly, Fifteen Thousand ($15,000.00) Dollars, for Anthony Hudvagner, Twenty-Five Thousand ($25,000.00) Dollars, for Lois Hudvagner, Eleven Thousand ($11,000.00) Dollars, for Kevin Hudvagner, a minor, Eleven Thousand ($11,000.00) Dollars, and for Michael Hudvagner, a minor, Eleven Thousand ($11,000.00) Dollars.

For Edwin Miller and Sarah Miller, jointly, Thirty Thousand ($30,000.00) Dollars, for Carolyn Miller, a minor, Eleven Thousand ($11,000.00) Dollars and for Susan Miller, a minor, Eleven Thousand ($11,000.00) Dollars.

For Carl Moore and Juliann Moore, jointly, Seventy Thousand ($70,000.00) Dollars, for Juliann Moore, Thirty Five Thousand ($35,000.00) Dollars, for Carl Moore, Fifteen Thousand ($15,000.00) Dollars, for Carl Moore, Jr., a minor, Eleven Thousand ($11,000.00) Dollars, for Marilyn Moore, a minor, Eleven Thousand ($11,000.00) Dollars, and for Melody Moore, a minor, Eleven Thousand ($11,000.00) Dollars.

For Bernice Shepherd Thirty Thousand ($30,000.00) Dollars, for Sharon Shepherd, a minor, Eleven Thousand ($11,000.00) Dollars.

For Joseph Ubene and Jeannine Ubene, jointly, Forty Thousand ($40,000.00) Dollars, for Philip Ubene, a minor, Eleven Thousand ($11,000.00) Dollars, for Rose-Ann Ubene, a minor, Eleven Thousand ($11,000.00) Dollars and for Roxanne Ubene, a minor Eleven Thousand ($11,000.00) Dollars.

For Ernest Vegh and Kaye Vegh, jointly Forty Thousand ($40,000.00).

For Ernest Warnholz and Hazel Warnholz, jointly, Thirty-Five Thousand ($35,000.00) Dollars, for Ernest Warnholz, Fifteen ($15,000.00) Dollars, for Hazel Warnholz, Eleven Thousand ($11,000.00) Dollars.

For Herbert Luppke and Rose Luppke, jointly, Sixty Thousand ($60,000.00) Dollars.

For Adam Gungle and Helen Gungle, jointly, Thirty Thousand ($30,000.00) Dollars, for Gary Gungle, a minor,

Eleven Thousand ($11,000.00) and for Adams Gungle, Eleven Thousand ($11,000.00) Dollars.

For Robert Olsen and Margaret Olsen, jointly, Forty Thousand ($40,000.00) Dollars, for Margaret Olsen, Eleven Thousand ($11,000.00) Dollars, for Bradley Olsen, a minor, Eleven Thousand ($11,000.00) Dollars and for Robert Olsen, Eleven Thousand ($11,000.00) Dollars.

For Bernard Mailloux and Gloria Mailloux, jointly, Thirty Thousand ($30,000.00) Dollars.

For Martin Dupuis and Donna Dupuis, jointly, Thirty Thousand ($30,000.00) Dollars.

Plus interest from the date of filing of this Complaint cost and attorney fees.

Count II

1-8. Plaintiffs reallege paragraphs one through eight of Count I above.

9. That the aforesaid wrongful and unlawful activities and the creation and maintenance of the nuisance by the defendants were done with wilful and wanton disregard for the safety, health, comfort, welfare and rights of these plaintiffs.

Wherefore plaintiffs pray that this court grant them jointly punitive damages against the defendants in the sum of One Million ($1,000,000.00) Dollars from each defendant.

Ripple and Chambers, P.C.
By /s/ Donnelly W. Hadden
Attorney for Plaintiffs
1720 First Federal Building
Detroit, Michigan 48226
WO 1-0130

Dated: June 19, 1970

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury in the above entitled cause.

Ripple and Chambers, P.C.
By /s/ Donnelly W. Hadden
Attorney for Plaintiffs
1720 First Federal Building
Detroit, Michigan 48226
WO 1-0130

Dated: June 19, 1970

ORDER AMENDING COMPLAINT

At a session of said court held in the Federal Building, Detroit this 2/9/71.

Present: Honorable Damon J. Keith, Federal Judge.

A Motion was brought by the defendants to dismiss this action as a class action. The plaintiffs concede the same but move to amend Complaint and withdraw their allegations of class action and substitute allegations of joinder under the provisions of Rule 20 (a); and this court being fully advised:

It is *ORDERED* that the plaintiffs' allegations containing a class action are hereby strickened from paragraph four of their Complaint and paragraph four of that Complaint is hereby amended to read as follows:

4. That these plaintiffs are joined under the provisions of the Federal Rule 20 (a).

Damon J. Keith

Approved as to form:
Richard Ford
Leslie Fleming
Thomas D. Beebe

ANSWER OF DEFENDANT THE DETROIT EDISON COMPANY

(Filed July 28, 1970)

The defendant The Detroit Edison Company separately and severally answers the complaint in this cause as follows:

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

This action is alleged (paragraph 4 of the complaint) to be brought as a class action and the complaint does not contain sufficient allegations to qualify it as such, and no class is described or identified.

Third Defense

There is a misjoinder of parties plaintiff and the complaint states no facts showing any cause of action common to the named plaintiffs.

Fourth Defense

The nuisance, if any, alleged in the complaint is a public nuisance and the plaintiffs do not allege themselves to have any official capacity or to be entitled to sue on behalf of the public at large.

Fifth Defense

There is a misjoinder of parties defendant; the complaint fails to charge defendant Edison with any act done or omitted in concert with the other defendants; and defendant Edison claims the benefit of a motion for severance and that it be dismissed out of this case or in the alternative that all other defendants be dismissed out of this case.

Sixth Defense

This action was not commenced within the time required by law after the accrual of the right of action alleged in the complaint.

Seventh Defense

The plaintiffs are guilty of laches and they and their predecessors in title have slumbered upon their rights, in that the supposed nuisance is alleged to have existed since prior to 1935.

Eighth Defense

As to Count I of the complaint defendant Edison admits the allegations of paragraphs 1, 2 and 5 in part as stated below; is without knowledge sufficient to answer paragraphs 3 and 6; denies the allegations of paragraphs 4, 7 and 8; denies the allegations of paragraphs 9 to 21 inclusive insofar as said paragraphs may be intended to reallege any tortious act or omission of defendant Edison, and is without knowledge sufficient to answer all other matters in said paragraphs.

As to Count II of the complaint defendant Edison realleges its answers to paragraphs 1 to 8 inclusive of Count

I; denies the allegations of paragraph 9 insofar as they relate to defendant Edison; for want of knowledge neither admits nor denies said allegations insofar as they may relate to other defendants.

1. As to paragraph 1 of said Counts defendant Edison shows that it is a corporation organized and existing under the laws of the States of New York and of Michigan and has its principal business office at Detroit, Michigan. For want of knowledge it neither admits nor denies the other allegations of said paragraph.

2. As to paragraph 2 of said Counts defendant Edison admits that it operates power plants in Detroit and in River Rouge adjacent to the Detroit River; denies that it operates any plant in Ecorse; and for want of knowledge neither admits nor denies the other allegations of said paragraph.

3. For answer to paragraph 3 of said Counts, defendant Edison for want of knowledge neither admits nor denies the allegations thereof insofar as said allegations relate to the other defendants. Insofar as said allegations relate to defendant Edison they are denied except as follows:

a) Beginning about 1903 in Detroit and about 1954 in River Rouge defendant Edison has been engaged in the manufacture of electricity for public utility distribution to an area of about 7,600 square miles with a population of over 4,000,000 people. Electricity is a necessity and defendant Edison is the sole source of supply thereof as to most of said territory and most of said people. Defendant Edison's lines are interconnected with public utility systems in other states and in Ontario, to which jurisdiction defendant Edison furnishes electricity from time to time.

b) There is not and there has never been any known way for the economical generation of electricity in this lo-

cality except as requires the emission of limited amounts of smoke and soot. Defendant Edison at all times has used all reasonable efforts and has so designed, redesigned, constructed, reconstructed and operated its plants so as to keep smoke and soot at a minimum. Large sums of money have been expended in designing, purchasing and installing smoke arresters, dust collectors, etc. The emission of smoke and soot from defendant Edison's plants is not and has never been unreasonable.

c) Defendant Edison's plants are situated in a heavily industralized area wherein considerable smoke and soot has always been generated by the activities of other firms and corporations not acting in concert with defendant Edison. The plaintiffs' lands and places of residence are remote from said area. On information and belief defendant Edison avers that the conditions of which plaintiffs complain existed if they ever existed, for a long time before plaintiffs acquired said lands or resided thereon.

Wherefore, defendant Edison prays that it may be dismissed out of this Court with its costs to be taxed.

Fischer, Sprague, Franklin & Ford
Richard Ford
/s/ George A. Leininger, Jr.
Attorneys for Defendant The
Detroit Edison Company
1100 Commonwealth Building
Detroit, Michigan 48226
962-5210

Dated: July 28, 1970

ANSWER OF DEFENDANT ALLIED CHEMICAL CORPORATION

(Filed August 14, 1970)

Comes now defendant Allied Chemical Corporation and severing from the co-defendants answers the complaint on file herein as follows:

First Defense

There is a misjoinder of parties defendants; the complaint does not aver that defendants are joint tort-feasors and there is nothing on the face of the complaint from which it could be concluded that plaintiffs' claims against the three defendants arose out of the same transaction or occurrence, or out of the same series of transactions or occurrences; this defendant should be dropped as a party defendant in this action, its name stricken from the summons and complaint and all other pleadings and the action continued without Allied Chemical Corporation as a defendant to the same effect as if it had never been joined as a party, or in the alternative Great Lakes Steel and The Detroit Edison Company should be dropped as parties defendant in this action, their names stricken from the summons and complaint and all other pleadings and the action continued without them to the same effect as if they had never been joined as parties.

Second Defense

There is a misjoinder of parties plaintiff; the complaint does not aver any right to relief by plaintiffs jointly and there are no averments from which it could be concluded that plaintiffs' claims against this defendant arose out of

the same transaction or occurrence or out of the same series of transactions or occurrences; all the plaintiffs except James Michie should be dropped as parties plaintiff in this action, their names stricken from the summons and complaint and all other pleadings and the action continued without the parties plaintiff other than James Michie to the same effect as if they had never been joined as parties.

Third Defense

This action is not maintainable as a class action; the complaint does not aver the prerequisites to a class action required by Rule 23 (a) in that there is no averment that the class is so numerous that joinder of all members is impracticable or that the representative parties will fairly and adequately protect the interests of the class; the complaint fails to aver any of the requirements of Rule 23 (b); the extent and nature of the class is not described or identified.

Fourth Defense

The Court lacks jurisdiction because the amount actually in controversy for each plaintiff is less than $10,000.00 exclusive of interest and costs and any claim of damages in excess of $10,000.00 is not made in good faith.

Fifth Defense

The complaint fails to state a claim against this defendant upon which relief can be granted.

Sixth Defense

The claims of the individual plaintiffs stated in the complaint did not accrue within three years before the com-

mencement of the action and are therefore barred by the applicable statute of limitations.

Seventh Defense

The face of the complaint shows the damages alleged by the various plaintiffs have accrued over periods of time of up to thirty-five years and by virtue of the applicable statute of limitations the liability, if any, of this defendant would not extend to any damages incurred more than three years prior to the commencement of this action.

Eighth Defense

Defendant denies each and every allegation contained in the complaint not herein specifically admitted.

1. Defendant admits that it is a New York corporation and occupies certain premises situated in Detroit, Wayne County, Michigan adjacent to or in proximity of the Detroit River whereupon defendant has operated and now operates divers facilities.

2. defendant admits that in the operation of its divers facilities some smoke, gases, fumes and dust have unavoidably been discharged into the air.

Wherefore, defendant Allied Chemical Corporation prays that it be granted relief in accordance with the defenses herein stated and that the action be dismissed with defendant's costs to be taxed.

Butzel, Long, Gust, Klein & Van Zile
By /s/ Leslie W. Fleming
Attorneys for Allied Chemical
1881 First National Building
Detroit, Michigan 48226
963-8142

Dated: August 13, 1970

ANSWER OF DEFENDANT NATIONAL STEEL CORPORATION

(Filed August 14, 1970)

In answer to the Complaint filed in this cause National Steel Corporation says:

First Defense

The Complaint fails to state a claim upon which relief can be granted.

Second Defense

There is a misjoinder of plaintiffs since the Complaint fails to contain allegations showing that joinder of plaintiffs is required under RCP 19 or showing that joinder of plaintiffs is permissible under RCP 20.

Third Defense

There is a misjoinder of defendants since the Complaint fails to contain allegations showing that any defendant is a necessary part to the action against the other defendants requiring joinder under RCP 19, or showing that joinder of defendants is permissible under RCP 20.

Fourth Defense

The Complaint fails to set forth allegations sufficient to show that this suit may be brought as a class action under RCP 23, and this suit is not one which may be brought as a class action under RCP 23.

Fifth Defense

This action was not commenced within the time required by law after the accrual of the right of action, if any, alleged in the Complaint.

Sixth Defense

If plaintiffs have any cause of action as alleged in the Complaint their failure to institute this suit until many years after the conditions described in the Complaint commenced amount to laches and they may not now be heard to complain.

Seventh Defense

If the facts alleged in the Complaint are true and if the conditions therein described have existed for the period of time therein set forth, defendants and each of them have acquired a prescriptive right to continue the activities complained of without liability to plaintiffs, irrespective of whether or not such activities amounted to a nuisance.

Eighth Defense

As to Count I of the Complaint, National Steel Corporation admits the allegations of paragraph 1 to the effect that Defendants are established in Michigan; admits that the defendants separately occupy certain premises in the cities of Detroit, River Rouge or Ecorse upon which they separately operate certain manufacturing plants or power plants; admits that this defendants' plants have since prior to 1935 discharged into the air some soot, smoke, gases and/or other related substances; has insufficient knowledge to answer the allegations of paragraphs 3 and 6, the alle-

gations with respect to plaintiffs' claims of damages set forth in paragraphs 9 through 21, and the remaining allegations of paragraph 1; and denies the remaining allegations of Count I.

As to Count II, defendants repeat their answers to the allegations contained in paragraphs 1 through 8 of Count I and deny the allegations of paragraph 9.

Hill, Lewis, Adams, Goodrich & Tate
By: /s/ Edward T. Goodrich
Attorneys for National Steel Corporation
3700 Penobscot Building
Detroit, Michigan 48226
Tel. 962-6485

Dated: August 17, 1970

MOTION TO DISMISS PLAINTIFFS' CLAIMS AGAINST ALLIED CHEMICAL CORPORATION FOR LACK OF JURISDICTION

(Filed August 5, 1971)

Allied Chemical Corporation, one of the defendants herein, by its attorneys, Butzel, Long, Gust, Klein & Van Zile, moves the Court to enter orders dismissing the claims of each of the several plaintiffs against this defendant for lack of jurisdiction for the reason that as between each of the said plaintiffs and this defendant the matter in controversy does not exceed the required jurisdictional sum or value of $10,000.00.

The plaintiffs' complaint seeks only damages and the amount claimed by each of the plaintiffs is stated in a

single sum. There are three named defendants but the complaint does not allege that the said defendants are joint tortfeasors or that the defendants are jointly liable. No separate amount is stated or claim alleged against Allied Chemical Corporation.

The three defendants are not joint tortfeasors nor jointly liable. To meet the jurisdictional requirements of the federal court the claim of each of the individual plaintiffs against each of the defendants must be in excess of $10,000.00.

Butzel, Long, Gust, Klein & Van Zile
By: /s/ Leslie W. Fleming
Attorneys for Defendant Allied Chemical Corporation
1881 First National Building
Detroit, Michigan 48226
963-8142

MOTION TO DISMISS PLAINTIFFS' CLAIMS AGAINST THE DETROIT EDISON COMPANY FOR LACK OF JURISDICTION

(Filed September 17, 1971)

The Detroit Edison Company one of the Defendants herein, by its attorneys, Fischer, Franklin & Ford, shows that on or about September 16, 1971 said attorneys requested the consent of Plaintiffs' attorneys to this Motion, which consent was not obtained. Defendant moves the Court to enter orders dismissing the claims of each of the several Plaintiffs against this Defendant for lack of jurisdiction for the reason that as between each of the said Plaintiffs and this Defendant the matter in controversy does not exceed the required jurisdictional sum or value of $10,000.00.

The Plaintiffs' Complaint seeks only damages and the amount claimed by each of the Plaintiffs is stated in a single sum. There are three named Defendants but the Complaint does not allege that the said Defendants are joint tortfeasors or that the Defendants are jointly liable. No separate amount is stated or claim alleged against The Detroit Edison Company.

The three Defendants are not joint tortfeasors nor jointly liable. To meet the jurisdictional requirements of the Federal Court the claim of each of the individual Plaintiffs against each of the Defendants must be in excess of $10,000.00.

The Brief of Allied Chemical Corporation in support of its Motion to Dismiss for Lack of Jurisdiction is hereby adopted by The Detroit Edison Company in support of the foregoing Motion.

Fischer, Franklin & Ford
By /s/ Richard Ford
Attorneys for Defendant, The Detroit Edison Company
1700 Guardian Building
Detroit, Michigan 48226
962-5210

Dated: September 16, 1971

MOTION TO DISMISS THE CLAIMS OF CERTAIN PLAINTIFFS FOR LACK OF JURISDICTION

(Filed September 21, 1971)

GREAT LAKES STEEL, a division of National Steel Corporation, one of the defendants herein, by its attorneys, ALEXANDER, BUCHANAN & SEAVITT shows that on or about September 21, 1961 said attorneys requested the consent of plaintiffs' attorneys to this Motion, which consent was not obtained. The

Great Lakes Steel Corporation moves the Court to enter Orders dismissing the claims of:

James and Victoria Michie, jointly
James Michie, individually
Anthony, Lois, Kevin and Michael Hudvagner
Edwin, Sarah and Susan Miller
Bernice Shephard
Joseph, Jeannine, Philip, Rose Ann and Roxanne Ubene
Ernest and Kaye Vegh
Ernest Warnolz
Adam and Helen Gungle
Robert Olsen
Bernard and Gloria Mailloux
Martin and Donna Dupuis

for the reason that the amount in controversy between each said plaintiff and all or any one of the defendants herein does not exceed the sum or value of $10,000.

This Motion is based on the pleadings and depositions taken in this case and in particular the following testimony given by the above plaintiffs in their depositions.

James Michie

The present value of the Michies' home is at least equal to its cost – Deposition of James Michie, P.19, Deposition of Victoria Michie, P. 4.

Medical expense paid by James Michie for Victorie Michie was approximately $100.00. The value of Mr. Michie's loss of consortium is relatively minor – Deposition of James Michie, PP. 29-34.

Anthony, Lois, Kevin and Michael Hudvagner

Mr. and Mrs. Hudvagner sold their hole at a price of $500.00 less than their purchase price plus the cost of improvements made by them – Deposition of Anthony Hudvagner, PP. 4,6.

The illnesses of each member of the family were minor and apparently involved little or no out-of-pocket expenses – Deposi-

tion of Anthony Hudvagner, pp. 14-24, Deposition of Lois Hudvagner, PP. 7-16.

Edwin, Sarah and Susan Miller

The property damage claims of the Millers aggregate less than $3,000.00 – Deposition of Edwin Miller, PP. 7-10.

Little or no out-of-pocket expense has been incurred for the children – Deposition of Edwin Miller, P. 20.

The claims of Susan Miller concern minor illnesses not requiring hospitalization or doctor's care – deposition of Edwin Miller, P. 21.

Bernice Shepherd

Mrs. Shepherd's claims include minor property damage and minor illnesses involving little or no out-of-pocket expense – See generally Deposition of Bernice Shepherd, PP. 13-32.

Joseph, Jeannine, Philip, Rose Ann and Roxanne Ubene

The Ubenes' home has not depreciated in value – Deposition of Jeannine Ubene, P. 3.

The damage to automobiles does not exceed $250.00. No damages to furniture are claimed – Deposition of Jeannine Ubene, PP. 8-11.

The only medical claims of the Ubenes are for reimbursement for their expenditures for vitamins involving between $100.00 and $200.00 annually – Deposition of Jeannine Ubene, PP. 19-20.

Ernest and Kaye Vegh

The value of the Veghs' home has substantially increased – Deposition of Ernest Vegh, PP. 4, 23.

Claim for damages to their property are under $3,000.00 Deposition of Ernest Vegh, PP. 13-16.

Ernest Warnolz

The value of Mr. Warnolz' property has substantially increased – Deposition of Ernest Warnolz, PP. 6 and 7.

Adam and Helen Gungle

The value of Mrs. Gungle's home has substantially increased – Deposition of Helen Gungle, P. 3.

The only material claim of Adam Gungle is for expenses which are attributable to the illnesses of Gayle Gungle which do not exceed $5,000.00 – Deposition of Adam Gungle, PP. 14 and 15.

Robert Olsen

The diminution in value of the Olsens' home is at most $5,000.00 – Deposition of Robert Olsen, PP. 3,8,9.

The claimed property damage does not exceed $3,000.00 – Deposition of Robert Olsen, PP. 7, 8 and 10.

The value of Mr. Olsen's claim for loss of consortium is trivial at most – Deposition of Robert Olsen, PP. 18 and 21.

Bernard and Gloria Mailloux

The decrease in the value of the Maillous' home is not more than $6,000.00 – Deposition of Bernard Maillous, P. 5.

The damages to their personal property is under $1,000.00 – Deposition of Bernard Mailloux, PP. 14 and 16.

Martin and Donna Dupuis

The value of the Dupuis' home apparently has increased – Deposition of Martin Dupuis, P. 4, Deposition of Donna Dupuis, P. 2.

ALEXANDER, BUCHANAN & SEAVITT

By: _____

Robert J. Stowe
Attorneys for Great Lakes Steel
2217 First National Building
Detroit, Michigan 48226
965-2310

MEMORANDUM OPINION DENYING MOTION TO DISMISS

(Filed November 10, 1971)

The complaint in this matter alleges that defendants, in the operation of their respective plants, discharge certain noxious pollutants into the air causing damages to plaintiffs health and property. Jurisdiction is founded on diversity of citizenship, defendants being citizens of Michigan and plaintiffs of the Province of Ontario, Canada.

The motion to dismiss is based on an argument that the plaintiffs have failed to satisfy the $10,000.00 amount in controversy requirement for diversity actions under 28 U.S.C.A. § 1332. Defendants contend that plaintiffs must satisfy this requirement as between each and every plaintiff and defendant. They argue that there is no joint liability for the acts complained of under Michigan law and thus defendants can not be considered joint tortfeasors and a separate jurisdictional amount must be shown by each plaintiff.

It is also contended that any claim for punitive damages by plaintiffs is "merely colorable" and may not be added to actual damages to arrive at the jurisdictional sum and further that even if allowable it could be claimed only by plaintiffs "individually inasmuch as their claims for actual damages are individual and not joint".

Plaintiffs claim that defendants are jointly liable under Michigan law because the injuries allegedly accruing to plaintiffs are not separable in terms of which act by which defendant caused any of the injuries alleged.

Plaintiffs further argue that punitive or exemplary damages are proper elements in determining the requisite jurisdictional amount.

For reasons that follow this court is of the opinion that the requirements of 28 U.S.C.A. § 1332 are satisfied in the instant matter.

It is clear that Michigan law is controlling on the question of whether the defendants may be held jointly liable for the allegedly tortious conduct and on the question of whether punitive damages may be included in the computation of the jurisdictional amount. *Erie R.R. v. Thompkins*, 304 U.S. 64.

Defendants' position is that they are not jointly liable for the alleged injuries to plaintiffs on the theory that the alleged injuries to the plaintiffs are not inseparable, and the acts of the alleged tortfeasors are separable. They cite *Cooley*, Torts (4th ed), wherein it is stated that merely because different parties pollute the atmosphere, that is commit separate wrongs, there is no reason why a plaintiff should be allowed recovery even though the separate wrongs culminate in an injury to plaintiff, responsibility for which cannot be divided among the various tortfeasors.

This court is of the view that this is not the state of the law in Michigan with respect to air pollution. In the absence of any Michigan cases on point, analogous Michigan cases in the automobile negligence area involving questions of joint liability after the simultaneous impact of vehicles and resultant injuries, are instructive.

In *Watts v. Smith*, 375 Mich. 120, quoting *Meier v. Holt*, 347 Mich 430, the Michigan Supreme Court said:

> "Although it is not always definitely so stated, the rules seem to have become generally established that,

> although there is no concert of action between tortfeasors, if the cumulative effects of their acts is a single indivisible injury which it cannot certainly be said would have resulted but for the concurrence of said acts the actors are to be held liable as joint tortfeasors."

In *Maddux v. Donaldson*, 362 Mich. 425 the Michigan Supreme Court cites *Landers v. East Texas Salt Water Disposal Company*, 151 Tex. 251, 248 S.W. 2d 731, a pollution case, in support of the above stated proposition. The court indicated that

> ". . . [i]t is clear that there is a manifest unfairness in 'putting on the injured party the impossible burden of proving the specific shares of harm done by each. . . . Such results are simply the law's callous dullness to innocent sufferers. One would think that the obvious meaness of letting wrongdoers go scot free in such cases would cause the courts to think twice and to suspect some fallacy in their rule of law'."

Plaintiffs contend that the *Maddux*, *id.* and *Watts*, *supra*, language applies here since there is no possibility of dividing the injuries herein alleged to have occurred and that it is impossible to judge which of the alleged tortfeasors caused what harm.

It is the opinion of this court that the rule of *Maddux*, *supra*, and *Landers*, *supra*, cited therein is the better, and applicable rule in this air pollution case. Plaintiffs will be allowed to aggregate their claims in order to satisfy the jurisdictional amount requirement because this court finds that the alleged injuries create a common and undivided interest among the several plaintiffs. *Neville v. Delta Insurance Co.*, D.C. Minn. 1968, 45 F.R.D. 345, and

that defendants, should liability be proven, are joint tort-feasors.

It is a further finding of this court that the punitive damages alleged by plaintiffs are also properly added to the actual damages and may be considered in the computation of the jurisdictional amount. It is clear that if the state where the federal court sits allows the recovery of exemplary damages these damages may be included. *Bell v. Preferred Life Assurance Society,* 320 U.S. 238. In Michigan exemplary damages may be recovered ". . . when injuries are inflicted intentionally or occur through negligence amounting to reckless or willful and wanton behavior"; *Ross v. Leggett,* 61 Mich 445 (1886); see also *Fleischer* v. *Buccilli,* 13 Mich App 135 (1968); *Oppenhuizer v. Wennersten,* 2 Mich App 288 (1966). Plaintiffs' pleadings allege such behavior and their claim does not fall within the "merely colorable" category condemned in *St. Paul Mercury Indemnity Company v. Red Cab Co.,* 333 U.S. 283. If plaintiffs can sustain the allegations made in the briefs and pleadings, punitive damages may be assessed by the trier of fact.

Defendants' motion to dismiss is denied.

Damon J. Keith
District Judge

Dated: 11-10-71

MOTION OF DEFENDANTS FOR RECONSIDERATION OR REHEARING ON MOTIONS TO DISMISS FOR LACK OF JURISDICTION

(Filed December 8, 1972)

Defendants move the Court to reconsider, or if necessary grant a rehearing on, defendants' motions to dismiss the claim of each of the several plaintiffs for lack of jurisdiction for the reason that as between each of the said plaintiffs and each defendant the matter in controversy does not exceed the jurisdictional sum or value of $10,000.00 required for actions based upon diversity under 28 USC §1332.

In support of the aforesaid motions defendants say:

Reconsideration of defendants' motions to dismiss for lack of jurisdiction should be permitted since no order has been entered on the original motions although a memorandum opinion denying the motions was filed by the Court. If granting of a rehearing is required the grounds therefor exist as are hereinafter set forth. The aforesaid opinion contains erroneous findings and conclusions of law based upon palpable defects by which the Court has been misled. Correction thereof would result in dismissal of plaintiffs' claims against these defendants for lack of jurisdiction instead of proceeding with a long, complex and costly jury trial.

In Count I the complaint alleges on behalf of each individual plaintiff spurious claims of injury to persons and property caused by air pollution constituting a nuisance and prays the Court "grant them compensatory damages against the defendants" in sums of $11,000.00 or more separately stated for each plaintiff.

The complaint does not allege that defendants are joint tortfeasors or that defendants are jointly liable for the claimed compensatory damages. The complaint does not allege that there was any concert of action among the defendants or that the acts of any individual defendant constitute a nuisance. The complaint has no allegation of indivisible injury to plaintiffs resulting from concurring acts of defendants nor any allegation that injury would not have resulted but for the concurrence of said acts.

In Count II the complaint prays that the Court "grant them jointly punitive damages against the defendants in the sum of One Million ($1,000,000.00) Dollars from each defendant".

The complaint does not allege any common or individual interest among the several plaintiffs except a *joint* claim for punitive damages which is not a claim upon which relief can be granted. No cause for action exists for a *joint* claim for punitive damages where the underlying claims for compensatory damages are *several* and not joint.

In its memorandum opinion denying motion to dismiss the Court held *inter alia:*

(a) that the plaintiffs would be allowed to aggregate their claims in order to satisfy the jurisdictional amount because the alleged injuries create a common undivided interest among the several plaintiffs;

(b) that the defendants, should liability be proven, are joint tortfeasors;

(c) that the punitive damages alleged by plaintiffs may be considered in the computation of the jurisdictional amount.

The holdings expressed in the Court's Memorandum Opinion are clearly erroneous and are not in accord with Michigan law which this Court is obliged to follow.

Counsel for plaintiffs does not concur and hence it is necessary to bring the motion.

Alexander, Buchanan & Seavitt
By Robert J. Stowe
Attorneys for Defendant Great Lakes Steel
2217 First National Building
Detroit, Michigan 48226
Fischer, Franklin & Ford
By: Richard Ford
Attorneys for Defendant Detroit Edison Company
1700 Guardian Building
Detroit, Michigan 48226
Butzel, Long, Gust, Klein & Van Zile
By /s/ Leslie W. Fleming
Attorneys for Defendant Allied Chemical Corporation
1881 First National Building
Detroit, Michigan 48226

CERTIFICATION

Robert J. Stowe, Richard Ford and Leslie W. Fleming state that they are the respective attorneys of record for defendants Great Lakes Steel, Detroit Edison Company and Allied Chemical Corporation in this action and represent to the Court that the motion herein is presented in good faith and not for purposes of delay.

/s/ Robert J. Stowe
/s/ Richard Ford
/s/ Leslie W. Fleming

OPINION OF THE COURT

(December 20, 1972)

PROCEEDINGS

The Court: I'm prepared to rule on this if you are prepared to have me rule on it at the present time. Well, I'm going to deny the Motion for rehearing really without indicating whether I believe the Motion is meritorious or not. I think the Keith opinion is the law of this case and I intend to follow it as long as it's there, and I will grant your Motion.

I call that specifically to your attention at this time because I'm going to grant your Motion to whatever weight my certification will have because you have got to get another certification, too, in this case, don't you, in the Court of Appeals? So whatever value that is, I don't associate myself or unassociate myself with the Keith opinion at this point. I view that as the law of this case. I'm not going to upset it.

I will grant your Motion, and I would like you to prepare the Order, if you would at this time, and I will sign it when you sign it and present it to you.

It would be my intention that you do not stop moving along on this. You continue to take your discovery, and so forth. My notes indicate the case is ready for trial the first of January. That's what the pre-trial Order said. That's what you agreed to as of last September, or something like that. Is this correct? Did I read that wrong? It was finally in the sense that as far as it's set, the schedule for trial, and so forth. I could set it for trial. Maybe I'm wrong.

Every case doesn't have to have one of these big fancy pre-trial Orders, though.

All right. Anything more that we can take up here? All right. Get Mr. Hadden's approval as to form on this so I don't really have to think the whole thing through.

All right. Thank you very much gentlemen.

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State of Michigan,
County of Wayne—ss.

I hereby certify that I have reported stenographically the proceedings in the above-entitled matter before the Honorable Charles W. Joiner, at Detroit, Michigan, and that the foregoing transcript, consisting of three (3) pages, is a true, full and accurate record of said proceedings.

/s/ Jerald M. Meyers,
Reporter

Detroit, Michigan

ORDER DENYING DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION WITH CERTIFICATION PURSUANT TO 28 USC 1292(b)

(Filed January 10, 1973)

At a session of said Court held in the Federal Building, Detroit, Michigan on January 10, 1973.

Present Honorable Charles W. Joiner, District Judge.

Defendants Great Lakes Steel, Detroit Edison Company and Allied Chemical moved to dismiss plaintiffs' claims

for lack of jurisdiction for the reason that as between each of the said plaintiffs and each of the defendants the matter in controversy did not exceed the required jurisdictional sums or value of $10,000.00.

The Court filed its Memorandum Opinion Denying Motion To Dismiss wherein the Court held, *inter alia:*

a. that the plaintiffs would be allowed to aggregate their claims in order to satisfy the jurisdictional amount because the alleged injuries create a common undivided interest among the several plaintiffs;

b. that the defendants, should liability be proven, are joint tortfeasors;

c. that the punitive damages alleged (jointly) by plaintiffs may be considered in the computation of the jurisdictional amount.

For the reasons stated in the Memorandum Opinion,

It is Ordered that the defendants' Motions To Dismiss For Lack of Jurisdiction be and the same hereby are denied.

In entering this Order it is the opinion of the Court that the order and the reasons therefor involve controlling questions of law as to which there is substantial ground for difference of opinion and an immediate appeal from the order may materially advance the ultimate termination of the litigation. Furthermore, the Court believes that an immediate appeal of this order could forestall what would otherwise be a long, complex and costly trial, and that therefore the exceptional situation is present which justifies an immediate appeal pursuant to 28 USC 1292 (b).

It Is Further Ordered that if appeal from this order is perfected, proceedings at the trial level should not be stayed to the extent that discovery may proceed so as not to delay preparation for trial if this order is affirmed.

/s/ Charles W. Joiner
United States District Judge

495 F.2d 213 (1974)

Nos. 73-1405-06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JAMES MICHIE, ET AL.,
Plaintiffs-Appellees,

v.

GREAT LAKES STEEL DIVISION, NATIONAL STEEL CORPORATION, ET AL.,
Defendants-Appellants.

APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed April 4, 1974.

Before: EDWARDS and CELEBREZZE, Circuit Judges, and KRUPANSKY,* District Judge.

EDWARDS, Circuit Judge. This is an interlocutory appeal from a District Judge's denial of a motion to dismiss filed by three corporations which are defendants-appellants herein. The District Court certified that the appeal presented a controlling issue of law and this court granted leave to appeal under 28 U.S.C. § 1292(b) (1970).

Appellants' motion to dismiss was based upon the contention that each plaintiff individually had failed to meet the requirement of a $10,000 amount in controversy for diversity jurisdiction set forth in 28 U.S.C. § 1332 (1970).[1]

* The Honorable Robert B. Krupansky, United States District Judge for the Northern District of Ohio, sitting by designation.

[1] 28 U.S.C. § 1332 provides:

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum

The facts in this matter, as alleged in the pleadings, are somewhat unique. Thirty-seven persons, members of thirteen families residing near LaSalle, Ontario, Canada, have filed a complaint against three corporations which operate seven plants in the United States immediately across the Detroit River from Canada. Plaintiffs claim that pollutants emitted by plants of defendants are noxious in character and that their discharge in the ambient air violates various municipal and state ordinances and laws. They assert that the discharges represent a nuisance and that the pollutants are carried by air currents onto their premises in Canada, thereby damaging their persons and property. Each plaintiff individually claims damages ranging from $11,000 to $35,000 from all three corporate defendants jointly and severally. There is, however, no assertion of joint action or conspiracy on the part of defendants.

Additionally, plaintiffs jointly seek $1,000,000 from each defendant, presumably as exemplary or punitive damages, because the nuisance complained of was "wilful and wanton."

This action was originally brought as a class action under Rule 23 (b)(3) of the Federal Rules of Civil Procedure but when defendants filed a motion to dismiss the class action aspect of the case, plaintiffs conceded the motion and were allowed to substitute allegations of permissive joinder under Rule 20 (a) of the Federal Rules of Civil Procedure. *See Zahn v. International Paper Co.*, — U.S. — (1973) (42 U.S.L.W. 4087 (U.S. Dec. 17, 1973)).

We believe the principal question presented by this appeal may be phrased thus: Under the law of the State of Michigan, may multiple defendants, whose independent actions of allegedly discharging pollutants into the ambient air thereby allegedly create a nuisance, be jointly and severally

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or value of $10,000, exclusive of interest and costs, and is between—

• • •

(2) citizens of a State, and foreign states or citizens or subjects thereof, and . . . ."

liable to multiple plaintiffs for numerous individual injuries which plaintiffs claim to have sustained as a result of said actions, where said pollutants mix in the air so that their separate effects in creating the individual injuries are impossible to analyze.

Appellants argue that the law applicable is that of the State of Michigan and that Michigan law does not allow for joint and several liability on the part of persons charged with maintaining a nuisance. They cite and rely on an old Michigan case, *Robinson* v. *Baugh*, 31 Mich. 290 (1875). They also quote and rely upon RESTATEMENT OF TORTS (FIRST) § 881:

> "Where two or more persons, each acting independently, create or maintain a situation which is a tortious invasion of a landowner's interest in the use and enjoyment of land by interfering with his quiet, light, air or flowing water, each is liable only for such proportion of the harm caused to the land or of the loss of enjoyment of it by the owner as his contribution to the harm bears to the total harm."

They also rely upon the comment under § 881:

> "The rule stated in this Section is applicable whether or not there has been a physical or chemical union of materials and whether or not fumes or polluted matter sent out by the defendant have united with those sent out by others before entry upon the plaintiff's land, since the unity of the means by which the harm is caused does not prevent recovery."

See also 1 T. COOLEY, TORTS § 86 (4th ed. 1932).

Appellees rely strongly upon the opinion of the District Judge in denying the motion to dismiss:

> This court is of the view that this is not the state of the law in Michigan with respect to air pollution. In the absence of any Michigan cases on point, analogous Michigan cases in the automobile negligence area involving

questions of joint liability after the simultaneous impact of vehicles and resultant injuries, are instructive.

In *Watts* v. *Smith*, 373 Mich. 120, quoting *Meier* v. *Holt*, 347 Mich. 430, the Michigan Supreme Court said:

> "Although it is not always definitely so stated, the rules seem to have become generally established that, although there is no concert of action between tortfeasors, if the cumulative effects of their acts is a single indivisible injury which it cannot certainly be said would have resulted but for the concurrence of said acts the actors are to be held liable as joint tortfeasors."

In *Maddux* v. *Donaldson*, 362 Mich. 425 the Michigan Supreme Court cites *Landers* v. *East Texas Salt Water Disposal Company*, 151 Tex. 251, 248 S.W. 2d 731, a pollution case, in support of the above stated proposition. The court indicated that

> ". . . [i]t is clear that there is a manifest unfairness in 'putting on the injured party the impossible burden of proving the specific shares of harm done by each. . . . Such results are simply the law's callous dullness to innocent sufferers. One would think that the obvious meanness [sic] of letting wrongdoers go scot free in such cases would cause the courts to think twice and to suspect some fallacy in their rule of law'."

Plaintiffs contend that the *Maddux*, *id.* and *Watts*, *supra*, language applies here since there is no possibility of dividing the injuries herein alleged to have occurred and that it is impossible to judge which of the alleged tortfeasors caused what harm.

It is the opinion of this court that the rule of *Maddux*, *supra*, and *Landers*, *supra*, cited therein is the better, and applicable rule in this air pollution case.

On this point we affirm the decision of the District Judge. This complaint appears to have been filed under the diversity

jurisdiction of the federal courts. All parties have agreed that Michigan law alone controls.[2]

Like most jurisdictions, Michigan has had great difficulty with the problems posed in tort cases by multiple causes for single or indivisible injuries. *Meier* v. *Helt*, 347 Mich. 430 (1957); *DeWitt* v. *Gerard*, 281 Mich. 676 (1937); *DeWitt* v. *Gerard*, 274 Mich. 299 (1936); *Frye* v. *City of Detroit*, 256 Mich. 466 (1932). *Compare Watts* v. *Smith*, 375 Mich. 120 (1965); *Maddux* v. *Donaldson*, 362 Mich. 425 (1961).

The first four of these cases clearly support the rule of law argued for by appellants. But the last two represent the more recent rule adopted by the Michigan Supreme Court and relied upon by the District Judge.

We believe that the issue was decided in the lengthy consideration given by the Michigan court in the *Maddux* case. There Justice Talbot Smith (now Senior Judge, United States District Court for the Eastern District of Michigan, Southern Division) in an opinion for the court majority (joined by the writer of this opinion) held:

> It is our conclusion that if there is competent testimony, adduced either by plaintiff or defendant, that the injuries are factually and medically separable, and that the liability for all such injuries and damages, or parts thereof, may be allocated with reasonable certainty to the impacts in turn, the jury will be instructed accordingly and mere difficulty in so doing will not relieve the triers of the facts of this responsibility. This merely follows the general rule that "where the independent concurring acts have caused distinct and separate injuries to the plaintiff or where some reasonable means of apportioning

[2] Arguably there may be a federal common law of nuisance applicable to injuries by pollution of water or air across state boundaries. *See Illinois* v. *Milwaukee*, 406 U.S. 91 (1972); *Texas* v. *Pankey*, 441 F.2d 236 (10th Cir. 1971). Thus far, however, no case has been decided under federal nuisance doctrine except where the action has been brought by a state.

Clearly, a suit for injunctive relief could have been (but was not) brought under federal environment law. *See* 42 U.S.C. § 1857 (h)(2) (Supp. 1973)

the damages is evident, the courts generally will not hold the tort-feasors jointly and severally liable."

But if, on the other hand, the triers of the facts conclude that they cannot reasonably make the division of liability between the tort-feasors, this is the point where the road of authority divides. Much ancient authority, not in truth precedent, would say that the case is now over, and that plaintiff shall take nothing. Some modern courts, as well, hold that this is merely the case of the marauding dogs and the helpless sheep relitigated in the setting of a modern highway. The conclusion is erroneous. Such precedents are not apt. When the triers of the facts decide that they cannot make a division of injuries we have, by their own finding, nothing more or less than an indivisible injury, and the precedents as to indivisible injuries will control. They were well summarized in Cooley on Torts in these words: "Where the negligence of 2 or more persons concur in producing a single, indivisible injury, then such persons are jointly and severally liable, although there was no common duty, common design, or concert action." *Maddux* v. *Donaldson*, 362 Mich. 423, 432-33 (1961) (Footnotes omitted.)

The *Maddux* case has been the subject of an extensive annotation wherein the A.L.R. concludes:

> American decisions, statutes, and rules of court have modified and liberalized the common-law rule as to joinder of defendants, and although there is apparently no satisfactory general rule as to when various persons acting independently may be joined in a tort action, many jurisdictions evidently would now permit joinder of two or more drivers who were involved in successive collisions or accidents with a plaintiff or his vehicle. See Am Jur Parties (1st ed §§ 40-43); Am Jur, Negligence (1st ed § 257); Prosser, Torts 2d ed § 46; 1 Harper and James, Torts § 10.1 100 A.L.R.2d 16, 29 n.13 (1965).

We recognize, of course, that the *Maddux* and *Watts* cases both involve multiple collisions causing allegedly indivisible

injuries. Hence, appellants are free to argue that the rule stated does not necessarily apply to the nuisance category of torts with which we deal here. Indeed, appellants call our attention to what appears to be a contrary rule applicable to nuisance cases referred to in the *Maddux* opinion. RESTATEMENT OF TORTS (FIRST) § 881.

In the latest Restatement, however, both the old and the newer rule are recognized and as the Michigan court held in *Maddux*, the question of whether liability of alleged polluters is joint or several is left to the trier of the facts. Where the injury itself is indivisible, the judge or jury must determine whether or not it is practicable to apportion the harm among the tortfeasors. If not, the entire liability may be imposed upon one (or several) tortfeasors subject, of course, to subsequent right of contribution among the joint offenders.

Perhaps the best summary of the rationale for such a rule is found in Harper and James:

> In the earlier discussion of the substantive liability of joint tort-feasors and independent concurring wrongdoers who have produced indivisible harm it was indicated that there were four categories into which these parties may be placed: situations in which (1) the actors knowingly join in the performance of the tortious act or acts; (2) the actors fail to perform a common duty owed to the plaintiff; (3) there is a special relationship between the parties (e.g., master and servant or joint entrepreneurs); (4) although there is no concerted action nevertheless the independent acts of several actors concur to produce indivisible harmful consequences.
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> • • •
>
> While the Restatement of Torts contains a short and apparently simple statement of the rule in category four, this type of situation has caused a great deal of disagreement in the courts. Here joint and several liability is sometimes imposed for the harm caused by the independent concurring acts of a number of persons. In all the situations in which such recovery is permitted the

> court must find first that the harm for which the plaintiff seeks damages is "indivisible." This can mean that the harm is not even theoretically divisible (as death or total destruction of a building) or that the harm, while theoretically divisible, is single in a practical sense so far as the plaintiff's ability to apportion it among the wrongdoers is concerned (as where a stream is polluted as a result of refuse from several factories). In the first type of case almost uniformly courts will permit entire recovery from any or all defendants. There is conflict, however, in the second situation, with some well-reasoned recent cases recognizing that the plaintiff's right to recover for his harm should not depend on his ability to apportion the damage but that this is a problem which is properly left with the defendants themselves. 1 F. Harper & F. James, The Law Of Torts § 10.1 at 697-98, 701-02 (1956) (Footnotes omitted.)

The text continues with a detailed discussion of *Landers v. East Texas Salt Water Disposal Co.*, 151 Tex. 251, 348 S.W. 2d 731 (1952), cited by the Michigan Supreme Court in the *Maddux* case and relied upon by the District Court in the instant case. *See* 1 F. Harper & F. James, The Law Of Torts, *supra* at 708-09.

Assuming plaintiffs in this case prove injury and liability as to several tortfeasors, the net effect of Michigan's new rule is to shift the burden of proof as to which one was responsible and to what degree from the injured party to the wrongdoers. The injustice of the old rule is vividly illustrated in an early Michigan case, *Frye v. City of Detroit*, 256 Mich. 446 (1932). There a pedestrian was struck by an automobile, thrown in the path of a street car and struck again. Since his widow could not establish which impact killed him, a verdict was directed against her case.

Since our instant case has not been tried, we do not speculate about what the facts may show, either as to injury or liability. But it is obvious from the briefs that appellant

corporations intend to make the defense that if there was injury, other corporations, persons and instrumentalities contributed to the pollution of the ambient air so as to make it impossible to prove whose emissions did what damage to plaintiffs' persons or homes. Like the District Judge, we see a close analogy between this situation and the *Maddux* case. We believe the Michigan Supreme Court would do so likewise.

In this diversity case Michigan law is not finally and conclusively declared. The District Judge, under *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), had to seek to establish what the Supreme Court of Michigan would do with this case on the basis of what it has already decided. Like the District Judge, we believe that the Michigan courts would apply the *Maddux* principles to the case at bar. Under *Maddux*, each plaintiff's complaint should be read as alleging $11,000 or more in damages against each defendant.[3] Therefore, the principle of *Zahn* v. *International Paper Co.*, — U.S. — (1973) (42 U.S.L.W. 4087 (U.S. Dec. 17, 1973)), which would disallow aggregation of plaintiffs' claims for the purpose of establishing diversity jurisdiction, does not apply to this case.

As to plaintiffs' second count which purports to state a joint $1,000,000 punitive damage claim against all three defendants, we believe that no facts are pled which establish a joint right to punitive damages under Michigan law. On remand plaintiffs may amend to make such claims individually. *Poledna* v. *Bendix Aviation Corp.*, 360 Mich. 129 (1960).

As modified, the judgment of the District Court is affirmed.

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[3] Michigan law, of course, does not allow collection of the judgment more than once. *Maddux* v. *Donaldson*, 362 Mich. 325, 451 (1961) (Black, J., concurring). It also allows for the joint defendant who pays the judgment to seek contribution from his joint tortfeasors. MICH. COMP. LAWS ANN. § 600.2925 (1967).

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES MICHIE, et al, ***Plaintiffs-Appellees,*** **vs.** **GREAT LAKES STEEL DIVISION, NATIONAL STEEL CORPORATION, et al,** ***Defendants-Appellants***	**No. 73-1405-06**

PETITION OF APPELLANT GREAT LAKES STEEL DIVISION, NATIONAL STEEL CORPORATION FOR REHEARING AND SUGGESTION FOR HEARING IN BANC

INTRODUCTION

Now comes GREAT LAKES STEEL DIVISION, NATIONAL STEEL CORPORATION (Great Lakes Steel), one of the Defendants and an Appellant in this matter, and respectfully petitions this Court for a rehearing of these appellate proceedings and this Court's decision of April 4, 1974. Great Lakes Steel further respectfully suggests that a rehearing in banc would be appropriate under the circumstances of this case.

The grounds for such a rehearing are that the Court has overlooked or misapprehended the proper application of the *Erie*[1] doctrine as construed and applied by the Court in *Werthan Bag*,[2] and has thus departed from established precedent in this Circuit.

ARGUMENT

Under the *Erie* doctrine, a Federal Court sitting in a diversity case must follow substantive state law. In determining what the applicable state law may be is particularly difficult where there is

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[1] *Erie v. Tompkins*, 304 US 64 (1938)

[2] *Werthan Bag Corp. v. Agnew*, 202 F2d 119 (6th Cir. 1953)

an absence of a clear pronouncement by the highest state court with respect to the rule of law involved. The Sixth Circuit has, however, established quite clearly the approach to be taken in such a case. The Federal Court must follow the generally recognized rule, not a minority rule; even if the minority rule is emerging and more equitable. This approach was announced in *Werthan Bag, supra,* 21 years ago and remains the established law of this Circuit:

> "In West v. American Telephone & Telegraph Co., 311 U.S. 223, 61 S.Ct. 179, 85 L.Ed. 139, the [Erie] doctrine was extended further to require the federal courts in such cases, where the highest court of the state has not pronounced on the subject, to ascertain from all the available data what the state law is and to apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from prior decisions of the federal courts.
>
> We think these two opinions of the Supreme Court [*Erie* and *West*] considered together, reveal how strongly the Supreme Court intended to restrict the federal courts in the pronouncement of their own views of the common law when inconsistent with the opinions of the state courts. It would seem that, in the teeth of such intended curtailment, this court would not be privileged to declare the law of Arkansas to be contrary to the *universal law applied in the other states whose courts have spoken on the subject.*" (Emphasis supplied)

In citing *Werthan Bag* with approval, the Tenth Circuit has stated:

> "Where there is a conflict in the decisions of the state courts of our country, the federal court construing the law of the state in question will assume that the courts of that state will follow the weight of authority.
>
> * * *
>
> And, we are constrained to say that we agree with some of the criticisms of the majority rule as pointed out in these ar-

> ticles and by the appellant. However, there can be no doubt but what the denial of such action remains the majority rule."[3]

But what is the majority rule to be applied to this case? This Court has cited, in its opinion, the case of *Landers* v *East Texas Salt Water Disposal Co.*,[4] as support for its holding. Although *Landers* is distinguishable from the instant case (because it involved two and only two tortfeasors) it, while adopting a minority rule, also clearly stated the majority rule on the issue in the case at bar:

> "But wth [sic] the exception of Oklahoma and Kansas [citations omitted], the courts of the country seem to be virtually unanimous in refusing to impose joint and several liability on multiple wrongdoers whose independent tortious acts interfere with a landowner's interest in the use and enjoyment of land by interfering with his air or water. *Restatement of the Law of Torts*, Vol. 4, p. 449 sec. 881; Cooley on Torts, 4th Edition, Vol. 1, pp. 283-287; 9 A.L.R. 947-952; 35 A.L.R. 412; 91 A.L.R. 763-765." 151 Tex. at 255, 248 S.W.2d at 733."

This Court has held that on the basis of *Maddux* v *Donaldson*,[5] it believes that the Michigan Supreme Court would apply the principles of joint and several liability to the Defendants in this case. Although *Maddux* did indeed find in favor of joint and several liability, it is quite distinguishable in all other respects. *Maddux* involved actor negligence, not nuisance. *Maddux* involved a few identifiable actors, not hundreds of identifiable and thousands of unidentifiable actors. And most importantly, *Maddux* itself, in adopting the *Restatement* rule on Concurring or Consecutive Independent Acts,[6] specifically referred to the exception thereto contained in §881, which reads:

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[3] *Crigui* v. *Blaw-Knox Corporation*, 318 F2d 811 (10th Cir., 1963). See also, *Beck* v. *F.W. Woolworth Co.*, 111 F.Supp. 824 (N.D. Iowa, 1953), cert. denied, 361 US 913 (1959).

[4] 151 Tex. 251, 348 S.W.2d 731 (1952).

[5] 362 Mich 425, 108 N.W.2d 33 (1961).

[6] *Restatement of Torts* (1939), §879

> "§881. Persons Contributing to a Nuisance. Where two or more persons, each acting independently, create or maintain a situation which is a tortious invasion of a landowner's interest in the use and enjoyment of land by interfering with his quiet, light, air or flowing water, each is liable only for such proportion of the harm caused to the land or of the loss of enjoyment of it by the owner as his contribution to the harm bears to the total harm."

In replying to Appellant's contention that §881 of the Restatement, applicable to nuisance cases, was acknowledged in *Maddux*, this Court stated: "In the latest Restatement, however, both the old and the newer rule are recognized ...". It is respectfully submitted that even if a newer rule is "recognized" in the *Restatement*, that does not make it any the less a minority rule, nor does that lessen the significance of the fact that the *Maddux* court itself "recognized" the majority rule as stated in §881.

In addition, it is fruther submitted that this Court has misapprehended what the latest *Restatement* in fact says. The Court has not cited a specific section of the *Restatement of Torts 2d* in which the "newer rule" is contained. Appellant assumes, however, that the Court was referring to §433B(2), relating to Burden of Proof, which states:

> "(2) Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor."

The comment and illustration to this section, while referring to pollution situations, do not appear to be applicable to nuisance cases and §433B is therefore not inapposite to §881, which remains unchanged. In addition, even to the extent applicable to negligence or intentional pollution situations, comment e. to §433B(2) states:

> "e. The cases thus far decided in which the rule stated in Subsection (2) has been applied all have involved a small number of tortfeasors, such as two or three. The possibility

arises that there may be so large a number of actors, each of whom contributes a relatively small and insignificant part to the total harm, that the application of the rule may cause disproportionate hardship to defendants. *Thus if a hundred factories each contribute a small, but still uncertain, amount of pollution to a stream, to hold each of them liable for the entire damage because he cannot show the amount of his contribution may perhaps be unjust.* Such cases have not arisen, possibly because in such cases some evidence limiting the liability always has been in fact available."[7] (Emphasis supplied)

In summary, therefore, Appellant Great Lakes Steel respectfully submits that the Court has incorrectly applied *Erie*, as interpreted by *Werthan*. It has adopted a clear minority rule based upon its fear of the hardship which would result to the Plaintiffs from application of the majority rule and it has justified this by speculating that the Michigan Supreme Court would apply the *Maddux* principle to a nuisance case, even though *Maddux* acknowledges the existence of *Restatement of Torts*, §881 to the contrary, which remains unchanged. Appellants therefore can only conclude that the Court has departed from the *Werthan Bag* requirement of "majority rule" and adopted a new interpretation under *Erie* - that a federal court may choose for a state court a "better" or "newer" rule. Appellant submits that if this departure is to be sanctioned, it should be done only by the Court sitting in banc.

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[7] See the Reply Brief of Great Lakes Steel for a discussion of the 108 separate companies or divisions identified by the International Joint Commission as being sources of emissions resulting in significant transboundary movement of air contaminants.

CONCLUSION

For the foregoing reasons, Appellant Great Lakes Steel respectfully requests that this Court grant a rehearing of its decision and opinion of April 4, 1974, and that a rehearing before the Court sitting in banc would be appropriate under the circumstances.

Respectfully submitted,

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Dated: May 1, 1974

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 73-1405-6

JAMES MICHIE, et al,

Plaintiffs-Appellees,

vs.

GREAT LAKES STEEL DIVISION, NATIONAL STEEL CORPORATION, ALLIED CHEMICAL CORPORATION and DETROIT EDISON COMPANY,

Defendants-Appellants

Appeal from United States District Court for the Eastern District of Michigan, Southern Division

PETITION BY ALLIED CHEMICAL CORPORATION FOR REHEARING AND SUGGESTION THAT REHEARING BE IN BANC

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Appellant, Allied Chemical Corporation, petitions for a rehearing to reconsider the judgment entered in this action on April 4, 1974.

I. GROUNDS

This petition is based on the following grounds:

1. In the opinion of petitioner the Court has erroneously assumed that a defendant who would be compelled to pay a judgment entered in this action would have a right to contribution from all persons who contributed to the pollution of the ambient air that caused damage to the plaintiffs' persons or homes.

2. In the opinion of petitioner and assuming the collection of judgments by plaintiffs the ruling of the Court imposing joint and several liability upon a defendant who has no right of contribution and whose emissions merely contributed to the pollution of the ambient air is inequitable, contrary to public policy and permits a taking of property without due process of law.

3. In the opinion of petitioner the Court has erroneously applied as new Michigan law a unique concept based upon a separate and distinctly minority rule.

II. ARGUMENT

Petitioner believes these points are substantial for the following reasons:

A. The Court's opinion clearly states - "Where the injury itself is indivisible, the judge or jury must determine whether or not it is practicable to apportion the harm among the tortfeasors. If not, *the entire liability may be imposed upon one (or several) tortfeasors subject, of course, to subsequent right of contribution among the joint offenders.*" (emphasis added) Slip opinion p 7. The opinion also indicates the Court's view that the defendants (and others contributing to air pollution) are joint tortfeasors and that the Michigan joint contribution statute[11] would be appli-

[11] MCLA 600.2925; MSA 27A.2925.

cable. Slip opinion footnote 3. In the Michigan case relied upon by plaintiffs and the Court, *Maddux* v *Donaldson*, 362 Mich 425 (1961), all the negligent tortfeasors were before the Court. While holding the negligent defendants jointly and severally liable, the Court was concerned with the fact and recognized that the defendants were not joint tortfeasors and referred to them as "concurrent tortfeasors". (p 435)

The defendants herein and the thousands of other contributors of pollution to the ambient air are clearly not joint tortfeasors and the joint contribution statute would have no application. More important is the fact that these defendants had *no* right of contribution. In the recent decision, *Moyses* v *Spartan Asphalt*, 383 Mich 314, 329-332 (1970), the Michigan Supreme Court defined the legal phrase "joint tortfeasor" saying - "In general it was, and still is, that where two (or more) persons owe to another the same duty and by their common neglect of that duty such other is injured, the two (or more) have committed a joint tort and therefore are *joint tortfeasors*". The Court distinguished *joint tortfeasors* from "the acts or omissions of several who act independently rather than in concert" and from those who may be joined and held responsible to the plaintiff "for damages sustained on account of their causally cooperating but non-joint acts or omissions - - -".

The Court in *Moyses* held that the Michigan joint contribution statute provided no substantive right and was not applicable to non-joint wrongdoers. In a judicial pronouncement the Court said:

> "- - - we have decided to overrule what is left of Michigan's common-law bar of contribution between or among 'wrongdoers', wilful or intentional wrongdoers excepted. Such overrulement will leave the issue of contribution to equitable principles as known hitherto and now in matters of express or implied contract. In such regard see Lorimer v. Julius Knack Coal Co. (1929), 246 Mich 214, 217, Comstock v. Potter (1916), 191 Mich 629, and the exhaustive as well as up-to-date treatise of the law of contribution appearing in 18 Am Jur 2d, Contribution, §§ 1-63, pp 6-95, particularly for

the general rules, the prerequisites, the measure and extent of contribution, the apportionment and the application of the law of contribution to particular persons."

Study of the rationale and principles relied upon by the authorities cited quickly reveals the problems involved in any attempt to apply them in an ambulatory cause of action and fact situation presented by pollution of the ambient air by an indeterminate number of sources. It is indisputable that the defendants herein control only a fraction of the indeterminable number of sources of the pollution that resulted in the alleged injuries to the plaintiffs.

Research has failed to turn up a single instance where contribution has been conceived to be applicable except in a situation involving an incident or event involving a finite number of persons whose status and liability for contribution can be determined. The cited authorities all rely upon the premise that the liability will be shared and no one tortfeasor will be liable for more than his *pro rata* share. The premise is succinctly stated in *Lorimer* v *Julius Knack Coal Co.*, cited in *Morses*, supra:

> "It has often been stated by the courts that contribution is founded on principles of equity and natural justice. The doctrine rests on the principle that when parties stand in aequali jure, the law requires equality, which is equity, and one of the parties will not be obliged to bear more than his just share of a common burden or obligation to the advantage of his co-obligors. 13 C.J. p. 821. It is applied in those cases where one or more of several parties equally obligated have done more than their share in performing a common obligation. 'And one who has paid more than his share of the joint obligation may recover contribution from his co-contractors.' Comstock v. Potter, 191 Mich. 629, 637. *But to work out an equitable result, the one seeking contribution should be allowed to recover only the proportionate share from each of the joint obligors from whom contribution can be had.*" (emphasis added) 246 Mich 214, 217.

In the instant case it is not only impossible to determine the proportionate share of each of the offenders but it is impossible to determine the number of offenders who contributed to the alleged injuries and damages. Such impossibilities are readily demonstrated in plaintiffs' (appellees') brief and appendix which cites and makes excerpts from the Joint Air Pollution Study of St. Clair-Detroit River Areas. The excerpts state that injury and damage from air pollution results from particulates, sulphur dioxide and other irritant gases and combinations thereof. These diverse pollutants come from thousands of various sources and in varying amounts.

Moreover, the claims of various plaintiffs extend over periods of several years. The inchoate right of contribution arises at the time each plaintiff's cause of action accrues. 18 Am Jur 2d Contribution pp 65, 66. (See discussion in dissenting opinion J. Black, *Morgan* v *McDermott*, 382 Mich 333, 364 (1969). Contribution depends upon a joint or concurrent obligation or liability. *Board of Cty Rd Comr's, etc Mich* v *American Air, Inc*, (ED Mich) 369 F Supp 698 (1974). The continuine changes in sources and emissions further prohibit any conceivable basis for pro rata contribution for injuries accruing over a period of years.

The principle of contribution is equality in bearing a common burden. Where the circumstance and relations of the plaintiff and those contributing to the cause of plaintiff's injury is such that there is no method of determining equality or the pro rata burden then there is no right of contribution. The defendants herein have no right of contribution under Michigan or federal law and the Court erred in assuming that they would have a right of contribution.

B. The imposition of joint and several liability upon a defendant who has no right of contribution and whose emissions merely contributed to the pollution of the ambient air is inequitable, contrary to public policy and permits taking of property without due process of law.

In the absence of a right of contribution the defendant is compelled to assume the entire burden of the judgment when its pro rata share of the injuries or damage could in actuality only amount to a small fraction under any conceivable circumstances. The result is unquestionably inequitable and contrary to the equitable result intended to be accomplished by allowing contribution among unintentional, non-joint wrongdoers.

The plaintiffs conceded and the Court recognized that the independent acts of many actors besides those of the named defendants concurred to produce the alleged indivisible harm to plaintiffs. The plaintiffs conceded that the acts of each separately might not have been actionable at all. (Appellees br p 4). Yet the effect of the Court's decision is to impose joint and several liability upon a defendant (and others who may be joined) merely upon proof of their emissions contributing to air pollution and without proof that their emissions alone would have caused *some* injury to the plaintiff's person or home.

Thus, without proof of causation and merely upon proof of an unapportioned and independently insignificant contribution to air pollution a defendant may be found liable and saddled with paying the entire amount of the plaintiff's damage.

Where there is causation and certainty of some but indivisible injury caused by each of two or more negligent automobile drivers public policy may support the imposition of joint liability to prevent denial of compensation to the injured plaintiff. But the imposition of joint liability upon actors whose wrongs are unintentional and independently non-injurious is patently inequitable. Requiring such wrongdoers to bear the consequences of the cumulative consequences in an air pollution situation involving thousands or millions of such actors is contrary to public policy. To bear such consequences without contribution is violative of due process.

Contrasted to the automobile impact cases here there is no certainty that injury to a plaintiff was caused at least in part by acts of a particular defendant. In the circumstances of this case with the impossibility of proofs of any causal connection between

the emission source and the injury, a defendant is adjudged and required to pay not just a share but the entire amount of the damage for injuries not shown to have been caused by wrongful conduct attributable to it.

The result does not comport with the essential requirements pertaining to due process of law.

C. The imposition of joint and several liability in the circumstances of this case represents an application of a unique concept as Michigan law. The concept is based upon a separate and distinctly minority rule and its application is contrary to the established policy of federal Courts under *Erie R Co* v *Tompkins*, 304 US 64, 58 S Ct 817, 82 L Ed 1188 (1938).

The Court has affirmed the ruling of the District Court which conceived the application of joint and several liability in this action upon the holding in *Maddux* v *Donaldson*, supra, and its reference to the *Landers* case, supra. The modification of the general rule announced in *Maddux* was expressly limited. In his concurring opinion Justice Black stated:

> "Having signed Mr. Justice Smith's opinion in this case, I would openly avow what was, and what is to be. Until now the Michigan rule has been settled. Where 2 or more wrongdoers separately cause the plaintiff to suffer an unknown or uncertain part or portion of the damages he has shown, each—hitherto—stood responsible to the plaintiff only for the harm caused by his tort, however difficult it may have been to establish the same.
>
> * * *
>
> "These sentiments are recorded solely that lawyers may know that *the former rule is now definitely modified to the extent, and only to the extent,* we now attest by majority vote. *Otherwise such former rule remains in full force.*" (emphasis added).

The limited application of the rule of *Maddux* was discussed in *Watts* v *Smith*, 375 Mich 120 (1965) and it was pointed out that a review of the cases in the annotation in 100 ALR2d 16 established that Michigan's "Maddux rule is contra to that existing in other states". (p 131)

The majority opinion of the Texas Court in *Landers* acknowledged that its view was an exception to the general law followed in almost all states. Moreover, no court is known to have ever applied its holding to air pollution or a situation involving an indeterminable number of sources of pollution.

The imposition of joint and several liability in the circumstances in the instant case is unique among all jurisdictions of the United States. Moreover, the authorities relied upon to support the unique holding are in themselves representative of separate and distinct minority views. In the absence of controlling decisions of the courts of the state where the federal court is sitting, the federal court is obligated to assume the state court would follow the majority rule and the weight of authority. *Werthan Bag Corp* v *Agnew*, 202 F2d 119 (6th Cir, 1953); *Small* v *United States*, 333 F2d 702 (3rd Cir, 1964); *Criqui* v *Blaw-Knox Corp*, 318 F2d 811 (10th Cir, 1963); *United States* v *Jones*, 229 F2d 84 (10th Cir, 1955), cert denied, 351 US 939 (1956); *Hudson* v *American Oil Co*, 152 F Supp 757 (ED Va, 1957), affirmed 253 F2d 27 (4th Cir, 1958).

III. SUGGESTION FOR REHEARING IN BANC

Petitioner respectfully suggests that a rehearing of the appeal in this matter in banc is appropriate for the following reasons:

1. The proceeding involves a question of exceptional importance.

2. There is substantial public interest in the subject matter and the legal issues presented.

3. The declaration of new Michigan law has ramifications far beyond the instant case and will likely influence decisions in other jurisdictions.

4. The decision will affect numerous pending cases, including large class actions, that will be prosecuted long before the issues can be considered by the Supreme Court of Michigan.

5. Affirmance of the judgment of the District Court on the issue presented raises significant problems and questions under the Federal Rules of Civil Procedure, particularly Rules 13(b), 14, 19, 20 and 23.

WHEREFORE, petitioner respectfully requests that this Court grant a rehearing in banc.

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By: Leslie W. Fleming
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Allied Chemical Corporation

Dated: April 30, 1974

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 73-1405-6

JAMES MICHIE, et al,

Plaintiffs-Appellees,

vs.

GREAT LAKES STEEL DIVISION, NATIONAL STEEL CORPORATION, ALLIED CHEMICAL CORPORATION and DETROIT EDISON COMPANY,

Defendants-Appellants

Appeal from United States District Court for the
Eastern District of Michigan, Southern Division

PETITION BY THE DETROIT EDISON COMPANY FOR REHEARING AND SUGGESTION THAT REHEARING BE IN BANC

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The Detroit Edison Company, one of the defendants and appellants, petitions for a rehearing to reconsider the decision handed down in this cause on April 4, 1974, and respectfully shows:

1. *Grounds* – The grounds upon which this petitioner requests a rehearing are identical to those set forth in the petitions being filed this day by the defendants and appellants Allied Chemical Corporation and Great Lakes Steel Division.

2. *Argument* – For its argument this petitioner concurs and adopts the contentions advanced and discussed in detail in said companion petitions.

3. *Suggestion for Rehearing in Banc* – We likewise feel that the issues involved are of sufficient public importance to justify a rehearing by the whole court.

Dated: May 1, 1974

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Nos. 73-1405-06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES MICHIE, et al., *Plaintiffs-Appellees,* vs. GREAT LAKES STEEL DIVISION, NATIONAL STEEL CORPORATION, et al., *Defendants-Appellants.*	ORDER

Before: EDWARDS and CELEBREZZE, Circuit Judges, and KRUPANSKY,* District Judge.

On receipt and consideration of petitions for rehearing and suggestions for rehearing in banc filed by appellants in the above-styled cases; and

No motion for rehearing in banc having been offered by any active judge of this court, the petition for rehearing has been referred to our panel for disposition; and

Noting that no argument is presented which was not previously considered by this court,

Said petitions are hereby denied.

Entered by order of the Court.

John P. Hehman
Clerk

*Honorable Robert B. Krupansky, United States District Judge for the Northern District of Ohio, Eastern Division, sitting by designation.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1974
No. 74-208

GREAT LAKES STEEL DIVISION, NATIONAL STEEL CORPORATION; ALLIED CHEMICAL CORPORATION; THE DETROIT EDISON COMPANY,

Petitioners,

vs

JAMES MICHIE *et al.*

Respondents.

RESPONDENTS' STATEMENT OF THE CASE

Although there may be a large number of "stationary sources," (i.e. industrial polluters) in the Detroit metropolitan area, many of them are too remote from respondents' properties to be defendants here. Respondents have joined as defendants the three companies which operate between them about 7 plants located at the river's edge. These plants are among the largest sources of effluent in the Detroit area, and are the largest in close proximity to plaintiffs. Emissions can be visually observed coming from these plants, crossing the river, and to plaintiffs' homes.

Plaintiff-respondents' theory and claim is that these defendants emissions into the air occur concurrently, that they mix together in the air, that the mixing synergistically increases the effect of the emissions, and that the mixed pollutants cause a nuisance which damages plaintiffs. Plaintiffs claim that the mixture causes an indivisible injury for which those who contribute to the mix are jointly liable.

I.

THE DECISION BELOW IS A CORRECT AND PROPER APPLICATION OF MICHIGAN LAW.

Even though the Michigan appellate courts have not specifically confronted a case where the question of whether many

defendants whose acts create a nuisance inflicting an indivisible injury on plaintiffs may be treated as joint tortfeasors. Michigan law on this question is quite easily found. A state is not without law excepting as its highest courts have declared it, and it is the task of the Federal court here to determine what that law is. *West* v *American Telephone & Telegraph Co.*, 311 U.S. 223, 61 S. Ct. 817, 85 L. Ed. 139.

> . . . where direct expression by an authorized state tribunal is lacking, it is the duty of the federal court, in dealing with matters of either common law or statute, to have regard for any persuasive data that is available, such as compelling inferences or logical implications from other related adjudications and considered pronouncements. The responsibility of the federal courts, in matters of local law, is not to formulate the legal mind of the state, but merely to ascertain and apply it. Any convincing manifestation of local law, having a clear root in judicial conscience and responsibility, whether resting in direct expression or obvious implication and inference, should accordingly be given appropriate heed.

Yoder v. *Nu-Enamel*, 117 F.2d 488, 489 (8th Cir. 1941).

The Seventh Circuit adopted the same test in *Hartzler* v. *Chesapeake and Ohio Railway Co.*, 433 F.2d 104 (7th Cir. 1970).

In Michigan there is "convincing manifestation of local law," and it has its root in the judicial conscience and responsibility of Hon. Talbot Smith, (now Senior Judge of the United States District Court for the Eastern District of Michigan) who wrote for the Michigan Supreme Court in *Maddux* v *Donaldson*, 362 Mich 425, 108 N.W. 2d 33 (1961), at page 430,

> When we impose upon an injured plaintiff the necessity of proving which impact did which harm in a chain collision situation, what we are actually expressing is a judicial policy that it is better that a plaintiff, injured through no fault of his own, take nothing, than that a tort-feasor pay more than his theoretical share of the damages accruing out of a confused situation which his wrong has helped to create. The mere statement of the policy exposes its aberrations.

In support of this he cited *Landers* v *East Texas Salt Water Disposal Company*, 151 Tex 251, 248 S.W. 2d 731 (1952), a case in which two industries which both polluted a stream were held jointly liable for the indivisible injuries to a downstream plaintiff.

In the *Maddux* case, although it was an auto negligence case, the court adopted the rule pronounced in the *Landers* pollution case. Throughout the *Maddux* opinion reference is repeatedly made to "tort-feasors," not just "negligence-feasors." The Michigan court took a rule applied in ancient cases to intentional tort and confusion-of-goods cases and applied it to all tortfeasors.

The persuasive and logical opinion ends with the expression,

> We percieve no reason why . . . tort-feasors should escape liability because of the very complexity of the injury created by their wrong.
>
> *Maddux, supra* at 436

In this case there is a complex situation. There is a confusion of pollutants being wafted across the Detroit River. The effluents which petitioners put in the air become confused together, helping to create the indivisible harm complained of. The obvious implication is that the Michigan court, faced with this case would apply the *Maddux* rule. Therefore so must also the federal court. The Michigan court did more than pronounce a procedural rule for auto negligence cases. It directly expressed a pervading judicial philosophy that wrongdoers should bear the risk of overpayment rather than the injured party bear the impossible burden of apportioning an indivisible injury; and this can be best accomplished by treating the wrongdoers as joint tortfeasors.

Petitioners contend that the *Maddux* rule applies to cases involving the tort of negligence but not the tort of nuisance. The cite no authority for this limitation. In Michigan, negligent conduct may be involved in the creation of a nuisance but it is not essential to liability.

> Primarily, nuisance is a condition. Liability is not predicated on tortious conduct through action or inaction on the part of those responsible. Nuisance may result from want of due care . . . but may still exist as a dangerous, offensive, or hazardous

condition even with the best of care.

Buckeye Insurance Co. v *State*, 383 Mich 630, 636, 170 N.W. 2d 476 (1970)

By their reasoning, if plaintiffs had pleaded that the defendants were guilty of want of due care under the circumstances, – for example by venting their emissions into an atmosphere which they knew or should have known to be dangerously overloaded, – then they could have no objection to being fictional joint tortfeasors. But their conduct remains the same, though pleaded in nuisance.

To declare that concurrent nuisance-feasors and concurrent negligence-feasors would be treated disparatly in Michigan is to attribute judicial aberrations to Michigan law. The federal courts can never presume that state law is absurd, in the absence of direct, compelling and unequivocal holdings so.

III

PETITIONERS ARE NOT DENIED FUNDAMENTAL DUE PROCESS OF LAW BY THE DECISION BELOW

Petitioners allege that because they are being treated as if they are joint tortfeasors here that they are denied fundamental due process. Their reasoning is that there are other polluters like themselves whose effluent contributes to the damages complained of, and who could also have been sued as joint tortfeasors if petitioners themselves are. Then they say that because Michigan law denies them the right to obtain contribution from such other polluters, they may have to bear the full responsibility, i.e. more than their fair share of the damages to be assessed. This they say deprives them of property without due process of law.

They would suffer no such deprivation however if Michigan law allows them a remedy for contribution against any other such emitter, which it does.

The Michigan Contribution Betweeen Joint Tortfeasors Act (M.S.A. sec. 27A. 2925) is set forth in the petition. It provides for contribution among joint tortfeasors but does not define who such persons might be. Petitioners' position is that the Court of Appeals

merely makes them jointly liable *as if* they were joint tortfeasors whereas they are not *real* joint tortfeasors, and the statute applies only to real joint tortfeasors. There are two fallacies in this.

First, *Maddox* v *Donaldson, supra* pg. 2, does not say that Michigan law will *pretend* that these defendants are joint tortfeasors, it says they *are* so.

Second, the problem in *Moyses* v *Spartan Asphalt Paving Co.*, 383 Mich 314, 174 N.W. 2d 797 (1970), relied upon by petitioners is somewhat different. In *Moyses* the plaintiff sued the defendant for negligent operation of a vehicle. Defendant sought to bring in the manufacturer and seller of a tire on its vehicle as third party defendants for contribution under the statute, on a products liability theory claiming that the crash was proximatly caused by a defective tire. The *Moyses* court said that the contribution statute did not apply because defendant *Spartan* and the tire people were tortfeasors whose liabilities to the plaintiff arose out of variant legal positions concurrently applied. But with respect to

> . . . those who may – under present rules of court – be joined as defendants, *by the plaintiff* . . ., and held responsible to him for damages sustained on account of their causally cooperating but non-joint acts or omissions . . .
>
> *Moyses, supra* 331

the Michigan Supreme Court deferred to its Court of Appeals decision in *Duncan* v *Beres*, 15 Mich App 318, 166 N.W. 2d 678 (1968).

In the *Duncan* case Judge Levin (now a Justice of the Michigan Supreme Court) declared that in a dramshop case the contribution statute applies as between bar owners who violate the dramshop act by selling liquor to an intoxicated person. He pointed out that the taverns were under a common burden of liability based upon violation of the same statutory duty, although at different places and serially in time. The court held that contribution applied to tavern owners because their liability does not depend on intentional wrongdoing or negligence, and arises without regard to the care they exercise to avoid it.

Again, in Michigan nuisance liability does not depend on intent or negligence and can arise from a condition which exists, see *Buckeye Ins. Co* v *State, supra*, pg 4). Also, the duty owed by these petitioners to the respondents was and is the same: to refrain from nuisance-creating activities. Michigan law would permit contribution among such persons whose concurrent emissions proximitly caused plaintiffs' harm.

A right to contribution exists only if there is a joint judgement, *In re: Lady D.*, 416 F. 2d 454 (6th Cir. 1969) under Michigan law. The Court of Appeals below did not enter a joint judgement. It shifted the burden of proof of divisibility of injuries from plaintiffs to defendants. If petitioners produce proofs from which the trier of fact can apportion the damages, then they may be apportioned. In that event there will be no contribution problem, each shall have been assessed its proper share. The issue is at this time premature. This court should no decide constitutional issues in advance of the necessity for doing so. *Asbury Hospital* v *Cass County*, 326 US 207, 66 S. Ct. 61, 90 L. Ed. 6 and *Clay* v *Sun Insurance Co. Ltd.*, 363 U.S. 207, 80 S. Ct. 1222, 4 L. Ed. 2d 1170.

There is no authority to support the proposition that failure of state law to provide a contribution remedy for one wrongdoer who helped cause harm is an unconstitutional deprivation of property without due process.

CONCLUSION

Judge Edwards, who wrote the decision below, was once a Justice of the Michigan Supreme Court. He participated in that court's decision in the *Maddux* case, (see 495 F. 2d at 217, pg. 44a of petitioners' appendix). The Court of Appeals has not decided an important state question in a way in conflict with applicable state law, nor have any other special and important reasons for review on certiorari been shown. The writ should be denied.

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